SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961.

No. 431

PARMELEE TRANSPORTATION COMPANY,
A DELAWARE CORPORATION, *Petitioner*,

vs.

JOHN L. KEESHIN, RAILROAD TRANSFER SERVICE, INC., HUGH W. CROSS, THE NEW YORK CENTRAL RAILROAD COMPANY, HOWARD E. SIMPSON, PAUL E. FEUCHT, WAYNE A. JOHNSTON, FRED G. GURLEY, THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, THE BALTIMORE AND OHIO RAILROAD COMPANY, CHICAGO & NORTH WESTERN RAILWAY COMPANY, ILLINOIS CENTRAL RAILROAD COMPANY AND THE PENNSYLVANIA RAILROAD COMPANY, *Respondents*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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INDEX.

PAGE

Opinions Below 1

Jurisdiction 2

Questions Presented for Review 2

Statutes and Rules Involved 4

Statement of the Case 5

Reasons for Granting the Writ 9

I. The Holding of the Court of Appeals That the Complaint Is Not Sufficient, in Effect Overrules the Decision of This Court in United States v. Yellow Cab Company and Brings the Court of Appeals in Direct Conflict with Other Applicable Decisions of This Court 9

II. The Limitation of the Trial to the Irrelevant Issue of "Public Injury" and the Use of Offers of Proof Made on That Issue to Justify the Entry of a Summary Judgment in a Jury Case So Far Departs from Proper Judicial Procedure as to Call for the Exercise of this Court's Supervisory Powers 12

III. Opinions of this Court Have Been Improperly Construed to Immunize a Conspiracy to Suppress Competition Where Other Laws Have Also Been Violated by a Participating Corrupt Government Official 15

IV. The Decision Below Grants an Immunity to Railroads in Conflict with Decisions of this Court 16

Conclusion 17

Appendix

Opinion Below 1a

Dissenting Opinion Below 22a

Judgment Below 24a

Citations.

Cases.

Apex Hosiery Co. v. Leader, 310 U. S. 469, 483, 512 (1940) 15

Beacon Theatres v. Westover, 359 U. S. 500, 504 (1959) 14

City of Chicago v. Atchison, T. & S. F. R. Co., 357 U. S. 77 (1958) 16

Eastern Railroad Conference v. Noerr Motors, 365 U. S. 127, 145 (1961)..... 15

Georgia v. Pennsylvania R. Co., 324 U. S. 439 (1945).. 16

Hunt v. Crumboch, 325 U. S. 821, 826 (1945)..... 15

McCandless v. United States, 298 U. S. 342, 346 (1936) 13

Northern Securities Co. v. United States, 193 U. S. 197 (1904) 16

Radiant Burners, Inc. v. Peoples Gas Light and Coke Company, et al., 273 F. 2d 196 (C. A. 7, 1960), Reversed 364 U. S. 656 (1961)..... 7

Radiant Burners, Inc. v. Peoples Gas Light and Coke Company, et al., 364 U. S. 656, 660 (1961).....11, 12

Sarkes Tarzian, Inc. v. United States, 240 F. 2d 467, 470 (C. A. 7, 1957)..... 14

Status of Parmelee, 288 I. C. C. 95, 101-2 (1953)..... 16

United States v. Employing Plasterers, 347 U. S. 186, 189 (1954) 11

United States v. Reading Co., 253 U. S. 26 (1920)..... 16

United States v. Southern Pacific Co., 259 U. S. 214 (1922) 16

United States v. Trans-Missouri Freight Association, 166 U. S. 290 (1897)..... 16

United States v. Union Pacific Railroad Co., 226 U. S. 61 (1912) 16

United States v. Yellow Cab Company, 332 U. S. 218, 229 (1947) 9, 10, 16

Statutes and Rules.

Section 1 of the Sherman Act, 26 Stat. 209, 15 U. S. C. § 1 4

Section 2 of the Sherman Act, 26 Stat. 209, 15 U. S. C. § 2 4

Section 4 of the Clayton Act, 38 Stat. 731, 15 U. S. C. § 15 4

Rules of Civil Procedure for the United States District Courts, Rules 38 and 39 14

Rules of Civil Procedure for the United States District Courts, Rule 42(b) 14

Rules of Civil Procedure for the United States District Courts, Rule 43(c) 13

Rules of Civil Procedure for the United States District Courts, Rules 56(b) and (c) 4, 8

U. S. Constitution, Amendment VII 14

Miscellaneous.

5 Moore's Federal Practice, ¶ 43.11 13

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

PARMELEE TRANSPORTATION COMPANY, a Delaware corporation, petitioner herein, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in the above cause on June 30, 1961.

OPINIONS BELOW.

The opinion in the United States District Court for the Northern District of Illinois, Eastern Division, denying the defendants' motion to dismiss the complaint (R. 38-44) is reported in 144 F. Supp. 480 (Sullivan, J., Sept. 19, 1956).

The opinion in the United States District Court for the Northern District of Illinois, Eastern Division, dismissing the complaint after a jury trial limited to the issue of "public injury" (R. 1728-53) is reported in 186 F. Supp. 533 (Miner, J., June 30, 1960).

The majority and dissenting opinions of the United States Court of Appeals for the Seventh Circuit rendered on June 30, 1961, are not yet reported but are printed in an appendix hereto, *infra*, pp. 1a-23a.

JURISDICTION.

The judgment of the United States Court of Appeals for the Seventh Circuit was entered on June 30, 1961 and is printed in an appendix hereto, *infra*, p. 24a. The jurisdiction of this Court is invoked pursuant to 62 Stat. 928, 28 U. S. C. § 1254 (1). Jurisdiction of the District Court was invoked pursuant to 26 Stat. 209 and 38 Stat. 731, 15 U. S. C. §§ 4, 15.

QUESTIONS PRESENTED FOR REVIEW.

1. Whether a complaint alleging a conspiracy between six railroads having terminal stations in Chicago, a member of the Interstate Commerce Commission and a seller-competitor of petitioner to suppress competition for the rendering of transfer services on behalf of all twenty-one terminal railroads in Chicago and to monopolize a constituent part of interstate commerce sets forth a violation of Sections 1 or 2 of the Sherman Act?

2. Where the district court erroneously limits a jury trial of a civil antitrust case to the irrelevant issue of "public injury" and excludes from the record any evidence of the conspiracy alleged in the complaint, may the Court of Appeals render a summary judgment against petitioner on the basis of offers of proof made at the separate trial of the irrelevant issue of "public injury" without such a de-

parture from the accepted and usual course of judicial procedure as to call for this Court's power of supervision?

3. Whether the participation of a member of the Interstate Commerce Commission in the conspiracy to suppress competition and to monopolize, immunizes and shields the other conspirators from the provisions of the federal antitrust laws because the public official could be sued or punished under other state or federal laws?

4. Whether the authority conferred on railroads by the Interstate Commerce Act to engage private interstation transfer agents (which contracts and services are exempt from Interstate Commission regulation) serves to immunize from the federal antitrust laws a group of six railroads charged with conspiring with other persons to restrain competition for contracts to render interstation transfer and baggage pick-up and delivery services for the twenty-one Chicago terminal railroads?

5. Whether a conspiracy resulting in a five-year exclusive and non-cancellable contract jointly entered into by twenty-one railroads (constituting all the railroads with lines terminating in Chicago) with a single transfer service company, which contract by its terms confers a complete monopoly on that company, fixes prices to be charged the public for certain transfer services and prevents any railroad from taking any independent action with respect to any matter covered by the contract, is proscribed by Sections 1 and 2 of the Sherman Act.

6. Whether the victim of a conspiracy in restraint of trade is precluded from redress under the Sherman Act merely because he was not prevented from submitting an offer which the conspiracy effectively excluded from being considered on its competitive merit?

STATUTES AND RULES INVOLVED.

The Statutes and Rules involved are:

(1) Section 1 of the Sherman Act, 26 Stat. 209, 15 U. S. C. § 1, providing in pertinent part:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, * * * is declared to be illegal: * * *."

(2) Section 2 of the Sherman Act, 26 Stat. 209, 15 U. S. C. § 2, providing in pertinent part:

> "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations shall be deemed guilty of a misdemeanor, * * *"

(3) Section 4 of the Clayton Act, 38 Stat. 731, 15 U. S. C. § 15, providing in pertinent part:

> "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States * * *, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

(4) Rule 56(b) and (c) of the Rules of Civil Procedure for the United States District Courts, Rule 56(b) and (c), 28 U. S. C., providing in pertinent part:

> "Rule 56. *Summary Judgment.*
>
> "* * *
>
> "(b) *For Defending Party.* * * *
>
> "(c) *Motion and Proceedings Thereon.* * * * The judgment sought shall be rendered forthwith if the

pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. * * *"

STATEMENT OF THE CASE.

This action was commenced on February 16, 1956, by Parmelee Transportation Company for treble damages and injunctive relief under the federal antitrust laws. The complaint alleges that since March 15, 1955, and continuing to date, the respondents (6 railroads, 4 railroad presidents, a competing transfer service and an Interstate Commerce Commissioner) have been engaged in a conspiracy to eliminate all competition for contracts or arrangements with 21 Chicago railroads, constituting the entire Chicago market, for the rendition of Chicago station transfer and baggage pick-up and delivery services (R. 13). The conspiracy eliminated all competition for contracts or arrangements with these railroads to perform interstation transfer or baggage pick-up and delivery services and was implemented and brought about and induced by the actions of Hugh W. Cross, a member of the Interstate Commerce Commission who, contrary to his public obligation, and acting on behalf of respondent Keeshin, petitioner's competitor, induced the respondent railroad presidents and railroads to foreclose any competition for the transfer business (R. 14-6).

It is alleged (R. 13-4) that Cross induced the six respondent railroads to join the conspiracy, because he was in a position to give favorable consideration to important railroad matters pending before the Interstate Commerce Commission. As a result, the twenty-one Chicago terminal railroads were caused to enter into a five-year contract at higher costs and on less favorable terms than would have

resulted from competition and which, by its terms, foreclosed all competition and created a monopoly in the Chicago transfer business for that period (R. 18-9, Ex. R. 361-81).

The complaint further alleges that Cross violated his duties and position as a commissioner, that prior to November 23, 1955 Cross did exercise his power as a member of the commission in matters affecting the respondent railroads (R. 18) and that as a result of an investigation of his conduct in this regard by the United States Senate Committee on Government Operation, Permanent Subcommittee on Investigations, Cross resigned his position as chairman of the commission prior to the institution of publice hearings for the purpose of concealing the conspiracy.

The complaint asks damages for petitioner in the amount of $6,400,000 because, by the conspiracy alleged, petitioner was excluded from competing for any part of the Chicago transfer business (R. 20-1).

Soon after the suit was brought, the respondents, except Cross, filed motions to dismiss the complaint on the ground that no claim was stated under the antitrust laws. These motions were denied, the court saying (R. 44):

> "A successful conspiracy to restrain and monopolize interstate commerce by eliminating competition is clearly set forth; that the methods of accomplishing this objective are unusual is not important." (144 F. Supp. 480, 486.)

The trial court further determined that with respect to the need for allegations of public injury (R. 42):

> "The allegations of the elimination of competition for the contract to provide terminal transfer services is itself sufficient. *United States* v. *Yellow Cab Co., supra.*" (144 F. Supp. 480, 485.)

The respondents thereupon answered the complaint (R. 44-71).

The case came on for trial in April, 1960. At the outset Judge Julius H. Miner, to whom the case had then been transferred, ordered a separate jury trial of an issue he designated as "economic public injury," over the objections of all counsel. (R. 396-416, 441-2.) The designation of "public injury" as a separate triable issue was ordered by Judge Miner in reliance on the decision of the Court of Appeals in *Radiant Burners, Inc.* v. *Peoples Gas Light and Coke Company, et al.*, 273 F. 2d 196 (C. A. 7, 1960). That decision was unanimously reversed by this Court on January 16, 1961, in a *per curiam* opinion, 364 U. S. 656. (See *Amicus Curiae* brief of *Parmelee Transportation Company* filed in that case, pursuant to leave of Court.)

Petitioner urged that public injury was an irrelevant issue in an antitrust case and that the establishment of a conspiracy in restraint of trade was proof of public injury. The trial court ruled, however, that no proof of conspiracy would be permitted, saying (R. 581-2):

> "Anything that has a tendency to establish or prove a conspiracy which includes negotiations with other people or the method of procurement of this contract will be inadmissible and held at this time to be deferred until the jury determines the issue of public injury."

The irrelevant issue was defined in his instructions to the jury as follows (R. 1712-14):

> "The Court has limited the issue before you to public injury. * * * You are instructed that in order to answer the special interrogatory submitted to you, you must determine whether the selection of Railroad Transfer Service, Inc., rather than Parmelee Transportation Company to perform the interstation transfer service in Chicago was reasonably calculated to prejudice the public interest and whether by reason of that selection there has been an appreciable lessening of service to the public or the public has been deprived of a service of over-all superiority."

During the course of the trial petitioner made offers of proof of conspiracy which were directed solely to the public injury issue (R. 583, 593-5). No other issue was tried in the district court.

On the so-called "public injury" issue, the jury returned a verdict for the respondents and the trial court entered judgment thereon dismissing the cause (R. 1725-6, 1754-5). Subsequently, the trial court issued an opinion *sua sponte*, stating that the complaint failed to state any violation of the federal antitrust laws and that the offers of proof made by petitioner solely on the issue of public injury failed to establish petitioner's case on other issues, and thereupon ordered that "[j]udgment should be entered for defendants on this *additional ground*." (R. 1753; 186 F. Supp. 533, 547.) (Emphasis supplied.)

The Court of Appeals for the Seventh Circuit affirmed the judgment dismissing the case and refused to rule upon whether or not the district court had committed error in limiting the trial to the irrelevant issue of "public injury" only. Circuit Judge Duffy, in a dissenting opinion, stated that this was error (App. *infra*, p. 22a):

> "Over the objections of both sides, trial was had on the issue of public injury only. In my opinion, this was error. The case of *Radiant Burners, Inc.* v. *Peoples Gas Light & Coke Co.*, 364 U. S. 656, demonstrates that public injury was an irrelevant issue."

However, the majority opinion of the Court of Appeals affirmed the judgment below by pronouncing it to be a summary judgment (citing Rule 56(b) and (c), 28 U. S. C.) and by weighing petitioner's offers of proof which were made only on the issue of public injury. In the face of petitioner's demand for a jury trial, where the record shows there was no hearing on the conspiracy issues in the court below, the Court of Appeals nevertheless treated the offers of proof on the limited issue of public injury

as constituting a complete record of all the evidence that could have been produced at a complete trial of all issues before a jury; it thus treated the record as if there had been a full trial of the very issues which the court below specifically had precluded.

REASONS FOR GRANTING THE WRIT.

I.

The Holding of the Court of Appeals That the Complaint Is Not Sufficient, in Effect Overrules the Decision of This Court in United States v. Yellow Cab Company and Brings the Court of Appeals in Direct Conflict With Other Applicable Decisions of This Court.

The Court of Appeals, in affirming the judgment of the district court holding that the complaint did not set forth any violation of the antitrust laws, stated (App. *infra*, p. 22a):

> "* * * we hold that the claim asserted by plaintiff does not set forth a violation of § 1 or § 2 of the Sherman Act. Therefore we affirm the judgment of the district court."

We are unable to make a more succinct and conclusive statement of the failure of the Court of Appeals to follow the applicable decision of this Court in *United States v. Yellow Cab Company*, 332 U. S. 218 (1947), than that set forth in the dissenting opinion of Circuit Judge Duffy, as follows (App. *infra*, pp. 22a-23a):

> "No railroad provides passenger service through Chicago. It is necessary for any through passengers arriving in the city by rail to transfer from one train to another and usually from one station to another. For many years prior to 1955, Parmelee Transportation Company had provided this service.
>
> "The complaint alleges a conspiracy among the de-

fendants to eliminate competition in the business of transporting passengers between railroad stations in Chicago and of performing pickup and delivery services. This is the very market and type of restraint which the Supreme Court held violated the Sherman Act in *United States* v. *Yellow Cab Company*, 332 U. S. 218. The Supreme Court there held that any attempt to impose an undue restraint on this market brings the Sherman Act into operation. It said, 332 U. S. at page 229: 'Any attempt to monopolize or to impose an undue restraint on such a constituent part of interstate commerce brings the Sherman Act into operation. * * *'

"In the *Yellow Cab* case, the Supreme Court considered as a competitive market 'contracts with rail roads or railroad terminal associations to transport passengers and their luggage between railroad stations in Chicago (332 U. S. at page 228).'

"It is well established the Sherman Act is applicable to conspiracies of buyers as well as sellers. *Mandeville Island Farms, Inc.* v. *American Crystal Sugar Co.*, 334 U. S. 219 (see cases cited in footnote 16 on page 235).

"The majority opinion apparently recognizes that under the *Yellow Cab* case, a conspiracy among sellers of transfer service is illegal. I am aware of no reasonable basis for holding an identical conspiracy between a group of buyers, a public official and one seller is not likewise proscribed."

From the above, it becomes apparent that the Court of Appeals has refused to follow this Court's decision in the *Yellow Cab* case and, unless this Court exercises its power of review, a conspiracy "between a group of buyers, a public official and one seller," imposing a restraint and a monopoly on a constituent part of interstate commerce becomes immune from any action under the federal antitrust laws.

This writes a new exception into the antitrust laws even more destructive than the one which the trial court sought

to impose by creating a condition precedent to the prosecution of an antitrust suit, *i. e.*, obtaining a favorable jury verdict on an issue of "economic public injury."

The decision of the Court of Appeals is also in direct conflict with this Court's clear and unambiguous holding in *United States* v. *Employing Plasterers*, 347 U. S. 186, 189 (1954), wherein it is said:

> "• • • [W]here a bona fide complaint is filed that charges every element necessary to recover, summary dismissal of a civil case • • • can seldom be justified."

It also conflicts with this Court's decision in *Radiant Burners, Inc.* v. *Peoples Gas Light and Coke Company, et al.*, 364 U. S. 656 (1961). In that case, this Court said at page 660:

> "By § 1, Congress has made illegal 'Every contract, combination • • • or conspiracy in restraint of trade or commerce among the several states • • •.' *Standard Oil Co.* v. *United States*, 221 U. S. 1. Congress having thus prescribed the criteria of the prohibitions, the courts may not expand them. Therefore, to state a claim upon which relief can be granted under that section, allegations adequate to show a violation and, in a private treble damage action, that plaintiff was damaged thereby are all the law requires."

II.

The Limitation of the Trial to the Irrelevant Issue of "Public Injury" and the Use of Offers of Proof Made on That Issue to Justify the Entry of a Summary Judgment in a Jury Case So Far Departs from Proper Judicial Procedure as to Call for the Exercise of This Court's Supervisory Powers.

This Court, in *Radiant Burners*, said the public injury issue was irrevelant:

> "* * * 'Congress [has] determined its own criteria of public harm and it [is] not for the courts to decide whether in an individual case injury [has] actually occurred'" (364 U. S. at p. 660.)

Here, the same Court of Appeals which decided the *Radiant Burners* case has, in effect, again sanctioned the use of the irrelevant "public injury" issue to nullify an application of the antitrust laws. Here, while tacitly conceding that the action of the trial court was in error and while, as noted by Circuit Judge Duffy, "trial was had on the issue of public injury only", the court affirmed the trial court's holding that it could utilize petitioner's offers of proof on a limited irrelevant issue as a basis for a summary judgment on the whole case.

The novel situation now presented is that in any civil antitrust case, a plaintiff may be defeated by being compelled to try an irrelevant issue and if, under that handicap, his offers of proof do not make out a case on every excluded issue, then his case must fail. There certainly is no sanction in the antitrust laws for depriving a plaintiff of his right to a jury trial in any such manner as that.

Since a trial of petitioner's case was improperly precluded that error cannot be obviated by a summary judgment based on offers of proof made only on the irrelevant

public injury issue, without so departing from proper judicial procedure as to call for the exercise of this Court's supervision. Otherwise, an antitrust suit cannot be tried in the Seventh Circuit.

Further, the use by the trial court and the Court of Appeals of an offer of proof on a limited issue to defeat an entire suit falls afoul of this Court's decision in *McCandless v. United States*, 298 U. S. 342 (1936), where the government contended that offers of proof had to include every element in the case and that if they did not there could be no error in their rejection. This Court pointed out the error in this contention as follows (p. 346):

> "The government now contends that the offer was insufficient because it does not exhibit an intention to show how much the value of the land would be increased, or the probable cost of the irrigation improvement. The evidence offered was material and relevant to the issue so far as it went. * * * If it had been suggested or held that the offer was incomplete, it is not unfair, when we consider the nature of the specific matters named, to assume that the evidence in respect of them could have been supplied. * * *
>
> "An offer of proof cannot be denied as remote or speculative because it does not cover every fact necessary to prove the issue. If it be an appropriate link in the chain of proof, that is enough."

The use made by the Court of Appeals of petitioner's offers of proof departs drastically from accepted practice. These offers were specifically made to enable a reviewing court to consider whether excluded evidence should have been received as a means of determining the existence of reversible error. Rule 43 (c), Rules of Civil Procedure for the United States District Courts; 5 Moore's Federal Practice, Para. 43.11.

The decision of the Court of Appeals lays down the rule that an antitrust plaintiff, as distinguished from other

plaintiffs, makes an offer of proof at his peril because he then opens up the case so that the trial and reviewing courts can draw inferences from such offer. We have stated that this rule apparently is confined to antitrust plaintiffs, because in a different kind of action, the Court of Appeals for the Seventh Circuit in rejecting the use of summary judgment has held that "[t]he drawing of inferences arising out of the evidentiary facts—whether disputed or undisputed—is ordinarily for the fact finder. Thus, summary judgment must be denied if the evidence is such that conflicting inferences could be drawn therefrom." *Sarkes Tarzian, Inc.* v. *United States*, 240 F. 2d 467, 470 (C. A. 7, 1957).

From the above, we submit that the handling of this case by the district court and the Court of Appeals has destroyed petitioner's constitutional right to a jury trial and brings the decision into direct conflict with this Court's decision in *Beacon Theatres* v. *Westover*, 359 U. S. 500 (1959). That case holds that the discretion conferred upon a trial judge to separate issues under Rule 42 (b) of the Rules of Civil Procedure cannot be employed to deprive a litigant of a full jury trial of an antitrust claim. This Court there emphasized the importance of a trial by jury of treble damage suits as "an essential part of the congressional plan for making competition rather than monopoly the rule of trade, * * *." (359 U. S. at p. 504.)

Where, as here, the issue singled out for trial is irrelevant and the whole case prepared by petitioner is excluded from consideration by a jury, the net result is the total denial of the right to a jury trial contrary to the provisions of the U. S. Constitution, Amendment VII. (See also Rules 38 and 39, Rules of Civil Procedure for the United States District Courts.)

III.

Opinions of This Court Have Been Improperly Construed to Immunize a Conspiracy to Suppress Competition Where Other Laws Have Also Been Violated by a Participating Corrupt Government Official.

The majority opinion of the Court of Appeals, while assuming that the success of the conspiracy "was made easier by the wrongful conduct of a public official," nevertheless holds that because "any party damaged thereby has * * * a ground for relief in the courts of this country" without invoking the Sherman Act, that therefore under this Court's decision in *Apex Hosiery Co. v. Leader*, 310 U. S. 469, 483, 512 (1940); *Eastern Railroad Conference v. Noerr Motors*, 365 U. S. 127, 145 (1961) and *Hunt v. Crumboch*, 325 U. S. 821, 826 (1945), the Sherman Act cannot be here invoked.

The Court of Appeals has thus in effect held in the instant case that because respondent Cross violated some other law, neither he nor his fellow conspirators can be sued under the provisions of the Sherman Act.

In reaching this result, the Court of Appeals has not only substantially curtailed private antitrust actions without any statutory justification for its action, but has without warrant extended the holding of this Court in the cited cases to a situation never contemplated by this Court. We submit that a fair reading of the *Noerr* and other cited decisions shows that they cannot be used to immunize the conspiracy alleged here from the application of the antitrust laws, even though it may be assumed *arguendo* that Cross could have been sued under some other law.

IV.

The Decision Below Grants an Immunity to Railroads in Conflict With Decisions of This Court.

Implicit in the Court of Appeals decision is the holding that there is an immunity from the antitrust laws for railroads conspiring to eliminate competition in the selection of an exclusive transfer agency in a terminal market, since provision for the transferring of passengers is in performance of duties imposed by the Interstate Commerce Act.* Such a position ignores the plain language of *United States* v. *Yellow Cab Co.* that "a conspiracy to eliminate competition in obtaining those exclusive contracts [Chicago transfer arrangements] * * * runs afoul of the Sherman Act" (332 U. S. at p. 229).

This Court has repeatedly held that concerted action on the part of railroads to restrain competition is illegal. See *United States* v. *Trans-Missouri Freight Association*, 166 U. S. 290 (1897); *Northern Securities Co.* v. *United States*, 193 U. S. 197 (1904); *United States* v. *Union Pacific Railroad Co.*, 226 U. S. 61 (1912); *United States* v. *Reading Co.*, 253 U. S. 26 (1920); *United States* v. *Southern Pacific Co.*, 259 U. S. 214 (1922); *Georgia* v. *Pennsylvania R. Co.*, 324 U. S. 439 (1945).

The reliance of the Court of Appeals on *City of Chicago* v. *Atchison, T. & S. F. R. Co.*, 357 U. S. 77 (1958) in support of its position is misplaced. No antitrust issue was there presented or decided. The conspiracy charged in this suit was not mentioned in any way.

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* The provision of interstation transfer facilities in terminal areas is not required of the railroads under the Interstate Commerce Act. There are 400 railroad terminal areas in the United States where passengers must transfer between stations and in over 80% of the terminals the railroads make no provision for transfer services. The passengers make their own arrangements: *Status of Parmelee*, 288 I. C. C. 95, 101-2 (1953).

CONCLUSION.

For the reasons stated above, this petition should be granted since it presents questions in which the rights of the public are vitally affected. These questions, if left decided in the manner set forth in the Court of Appeals opinion, would create exemptions from the provisions of the antitrust laws not warranted by the statutes or the decisions of this Court. Private enforcement of the antitrust laws, which is a valuable adjunct to the enforcement of these laws by the Department of Justice, would be seriously prejudiced to the manifest detriment of the public interest in a free and competitive market for trade in interstate commerce.

Respectfully submitted,

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APPENDIX.

IN THE UNITED STATES COURT OF APPEALS

For the Seventh Circuit.

No. 13160 September Term, 1960—April Session, 1961.

Parmelee Transportation Company, a Delaware corporation,
Plaintiff-Appellant,
vs.
John L. Keeshin, Railroad Transfer Service, Inc., Hugh W. Cross, The New York Central Railroad Company, Howard E. Simpson, Paul E. Feucht, Wayne A. Johnston, Fred G. Gurley, The Atchison, Topeko and Santa Fe Railway Company, The Baltimore and Ohio Railroad Company, Chicago & Northwestern Railway Company, Illinois Central Railroad Company and The Pennsylvania Railroad Company,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

June 30, 1961

Before DUFFY, SCHNACKENBERG and CASTLE, *Circuit Judges.*

SCHNACKENBERG, *Circuit Judge.* Parmelee Transportation Company, a Delaware corporation, plaintiff, has appealed from a judgment of the district court in favor

of John L. Keeshin, Railroad Transfer Service, Inc., Hugh W. Cross, The New York Central Railroad Company, Howard E. Simpson, Paul E. Feucht, Wayne A. Johnston, Fred G. Gurley, The Atchison, Topeka and Santa Fe Railway Company, The Baltimore and Ohio Railroad Company, Chicago & Northwestern Railway Company, Illinois Central Railroad Company and The Pennsylvania Railroad Company, defendants. Plaintiff's complaint filed February 16, 1956 alleges a combination and conspiracy in restraint of trade in violation of Sections 1 and 2 of the Sherman Act (15 U. S. C. A. §§ 1 and 2), and prays for treble damages and injunctive relief. The judgment bases a dismissal of the action on, first, a jury's verdict that the public has not been injured, and, second, on the alternative ground that plaintiff failed to establish a violation of § 1 or § 2 of the Sherman Act or any other provision of the antitrust laws and did not state a claim thereunder.[1]

Plaintiff, prior to September 30, 1955, was engaged in the business of transferring passengers and their baggage between railroad terminal stations in Chicago and the pickup and delivery of baggage within the Chicago metropolitan area to and from railroad stations.[2]

The defendants are (a) John L. Keeshin, and his company, Railroad Transfer Service, Inc., herein called Transfer, (b) Hugh W. Cross, former chairman of the Interstate Commerce Commission, and (c) six railroads, constituting a committee chosen by twenty-one railroads having passenger terminals in Chicago and the Presidents of four of these six railroads.[3]

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1. The district court's opinion is reported in 186 F. Supp. 533.

2. *Atchison, T. & S. F. Ry. Co. v. City of Chicago*, 240 F. 2d 930, 933, affirmed 357 U. S. 77, 79.

3. This description of the committee we have taken from plaintiff's brief.

The complaint alleges the matters referred to in the following two paragraphs.

Since prior to March 15, 1955, the defendants have been engaged in a conspiracy to eliminate all competition for contracts or arrangements with the Chicago railroads for the rendition of Chicago station transfer service and baggage pickup and delivery service.

Contrary to his public obligations and acting on behalf of Keeshin, Cross induced the defendant railroad presidents and defendant railroads to foreclose any competition for the transfer business, and to cause the twenty-one railroads comprising the entire market for such services to do business exclusively with a new company to be formed by Keeshin, regardless of whether the cost and terms proposed by Keeshin were less favorable than could be obtained as a result of free competition. Keeshin secured Cross' improper intervention by promises of a valuable consideration. Cross was able to induce the railroads to join the conspiracy by using his position as a member of the Interstate Commerce Commission. The railroads accepted the proposal in order to influence Cross to give favorable consideration to important railroad matters pending before the Commission. As a result, the railroads entered into an exclusive five-year contract with Transfer. The contract, by its terms, foreclosed competition for the Chicago transfer business.

Soon after the suit was commenced, certain defendants filed a motion to dismiss, on the ground that the complaint failed to state a claim up which relief could be granted and specifically, that there were not sufficient facts alleged to establish public injury. The late Judge Philip L. Sullivan overruled the motions, and defendants filed answers.

Upon the reassignment of the case to Judge Miner,

an order was entered separating the issue of public injury for trial, over the objections of both sides.

After the case proceeded to trial, plaintiff's counsel made offers of proof of conspiracy "under our complaint", because, he explained, he believed it necessary in case of an appeal. Subsequently the court permitted these offers of proof to be made but eventually the offers were, according to plaintiff's brief, "stricken from the record by the court."

At the close of plaintiff's case, Judge Miner held that, even if there was a verdict of public injury, "this case does not belong in the family of anti-trust cases under any conditions, from the entire record before me."[4] He made it clear that he was disposing of the case upon the allegations of the complaint and all evidence offered by plaintiff and received upon the trial, as well as the facts stated in all offers of proof made by plaintiff, regardless of whether he had ruled adversely to any of said offers. He announced that, viewing said evidence and offers of proof in the light most favorable to plaintiff, and making all reasonable inferences therefrom in its favor, he determined that plaintiff had failed to establish a violation of § 1 or § 2 of the Sherman Act or of any other provisions of the antitrust laws, and that the complaint, as amended, relating to issues other than that of the verdict of the jury, "do not state a claim upon which relief can be granted under Section 1 or Section 2 of the Sherman Act, or any other provision of the antitrust laws; * * *."

The judgment from which appeal has been taken was for defendants on the verdict, ordered and adjudged that

4. The court submitted to the jury the following interrogatory: "Has the selection of Railroad Transfer Service, Inc., rather than Parmelee Transportation Company to perform the interstation transfer service for the railroads terminating in Chicago resulted in injury to the public?" The jury answered, "no".

plaintiff take nothing by its action, and ordered and decreed that the complaint, as amended, insofar as it sounded in equity, be dismissed for want of equity and judgment be entered for defendants on the equitable issues.

1. Plaintiff contends that Judge Miner erred in overruling Judge Sullivan's decision denying defendants' motion to dismiss the complaint on the ground that it failed to state a claim upon which relief could be granted. Plaintiff's counsel speak of Judge Sullivan's opinion as "the law of the case". A reference to that opinion which was filed in 1956 makes it clear that Judge Sullivan considered only the "complaint on its face". The action of Judge Miner was the entry of a summary judgment and involved not merely the complaint[5] which was before Julge Sullivan, but also offers of proof and evidence submitted only to Judge Miner.

Regardless of the impact of any law-of-the-case rule, our duty is to determine whether the judgment of Judge Miner is correct. In fact, we should sustain any judgment from which an appeal has been taken if it is supported by the record and the law, regardless of whether the lower court has ruled erroneously or has ruled at all on that ground. *Jaffke* v. *Dunham*, 352 U. S. 280, 281. Obviously we cannot be expected to reverse a correct decision by one district judge simply because we find that it is contrary to a prior ruling by another district judge in the same case, *i.e.* contrary to the "law of the case".

2. This judgment, being based upon the complaint and plaintiff's offered evidence, did not involve a finding of any genuine issue as to any material fact. It is a

5. The complaint was amended in respects not here material.

summary judgment. Rule 56 (b) and (c), 28 U. S. C. A. Each answer filed by the defendants asks for dismissal of the complaint. In *Repsold* v. *New York Life Insurance Company*, 216 F. 2d 479, 483, we said:

> "The court is authorized under the plain provisions of this rule to summarily determine whether or not a bona fide issue of fact exists between the parties to the action. A determination by the court that such issue is presented makes the rule inoperative. On the other hand, if the pleadings, and proof in the form of depositions, affidavits and admissions on file, disclose that no real cause of action or defense exists, the court may determine that there is no issue to be tried by a jury and may grant a summary judgment.
>
> "Rule 56 does not provide any method for exactly determining the presence of an issue of fact, and so each case depends upon the facts peculiar to it. Speaking in general terms, the court is not authorized under the rule to try issues of fact but it has the power to penetrate the allegations of fact in the pleadings and look to any evidential source to determine whether there is an issue of fact to be tried."

3. Plaintiff's complaint alleges that it was ready, willing and able, and had offered to continue to engage in the station transfer and pickup and delivery business on terms and conditions favorable to the railroads and to the traveling public, but had been prevented from so doing from and after September 30, 1955 by the conspiracy described. It also alleges that the

> "• • • services performed by TRANSFER pursuant to said contract have been and are more costly to said railroads and less extensive and valuable than the services previously performed by plaintiff and which plaintiff had offered to continue to perform."

We are assisted by plaintiff's brief in the following statement of offers of proof which the record shows were made by plaintiff before Judge Miner:[6]

> Plaintiff had rendered satisfactory service to the railroads in Chicago over a period of many years. In 1954, a committee of six railroads (representing each of the six railroad terminals) was appointed by the twenty-one railroads terminating in Chicago, to interview other prospective transfer carriers to see whether the cost to the railroads of providing the station transfer services could be reduced. The memorandum prepared by the committee and submitted to prospective contractors stressed that the cost of service was the committee's only concern in these words:
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> > "We would have it known that the railroads serving Chicago have enjoyed their relationship with the Parmelee Transportation Company, and they feel that the services of each has contributed to the success of the other, notwithstanding the economic conditions are such that the railroads must not undertake to pay a greater fee for the services performed than is necessary, and because the greater portion of the transfer fee paid to the Parmelee Transportation Company is absorbed by the outbound railroad. * * *"
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> Negotiations were conducted over a period of months and the committee concluded that the proposals received, including one from Keeshin, were unsatisfactory and no change from plaintiff was warranted unless the transfer rate was cut 10¢ to 20¢ per coupon from $1.20. The committee report was presented to all of the twenty-one terminal railroads on February 1, 1955, and it was the consensus of opinion that there should be no change from plaintiff. The Santa Fe Railroad representative reported:
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> > "* * * Chicago Terminal Lines were advised

6. Readers of this opinion are cautioned that in this case the truth of the allegations of fact contained in these offers has not been established nor been a subject of inquiry. We assume these facts only for the purpose of this appeal.

that we had received one bid for transfer of passengers and baggage from Keeshin at approximately same rate Parmelee is now charging, and one bid for transfer of baggage only. Chairman Padrick advised lines present that it was the view of the committee studying the transfer arrangements that a change in the operators should not be considered unless, say, bid of $1.10 or $1.00 including baggage was submitted by some transfer company."

The Soo Line representative stated:

"* * * The Railway Express Agency made the statement that we were getting a good deal at present and that they would not touch the proposition for anything less than cost plus 15 percent.

"The consensus of the meeting seemed to be there would be no point in disturbing the present relationship unless we could reduce the price to around $1.00 or $1.10."

The B & O Railroad said:

"J. L. Keeshin's proposal not sufficient decrease from present cost to warrant change from Parmelee Co. Railroads worse off if must load and unload trailers."

Plaintiff was then contacted and submitted its proposal of March 15, 1955, which undertook to provide $500,000 of new equipment, reduce the coupon rate from $1.22 to $1.20 and provide for wage and traffic escalator clauses. This proposal was well received. One of the Vice Presidents of the New York Central (the largest transfer railroad, accounting for over 22.9% of the traffic) wrote plaintiff on March 24, 1955, and stated:

"I have read your proposal of March 15th addressed to Mr. Padrick, concerning the transfer service performed by Parmelee Transportation Company at Chicago.

"I see no reason why it should not be adopted by the Chicago terminal lines, as it impresses me as being fair and reasonable."

The committee considered plaintiff's proposal on March 17, 1955, and undertook to reach its decision within thirty days. The interviews were concluded.

Keeshin late in March, 1955, had a meeting with Interstate Commerce Commissioner Hugh W. Cross in Washington, D. C. Keeshin asked Cross to put in a good word for him with the railroads with whom he was negotiating. This Cross did. Cross reported to Keeshin on his talks with the railroad executives and when Keeshin was awarded the transfer contract Keeshin called Cross to thank him for the help rendered.

There were thirty-four long distance telephone calls between them during the period from March 23 to September 18, 1955. The calls were usually made late at night and were most frequently of long duration—some exceeded forty-five to sixty minutes in length. Cross admitted that he had many telephone conversations with Keeshin concerning the transfer negotiations.

In April 1955, Cross visited President Simpson of the B & O in his office in Baltimore and called him on long distance telephone on several occasions and in each instance discussed the Chicago transfer negotiations. Cross likewise visited Carpi, Vice President of the Pennsylvania, in his office in Philadelphia and called him on the long distance telephone on several occasions, usually coinciding with the Simpson calls and discussed he transfer matter with Carpi.

News of these contacts quickly spread to the committee members. On April 27, 1955, President Perlman of the New York Central spoke to his Chicago Vice President and requested that the committee not act on the transfer contract award until Perlman "would have an opportunity to analyze it." The chairman of the committee, Bone, Chicago passenger agent of N. Y. C., wanted to know from his superior what position he should take "in view of the analysis of Perlman."

On April 28, 1955, Bone called Smart of the Illinois Central and informed him that "some railroad presidents have been contacted"; that he was calling a com-

mittee meeting for May 19 and "that in view of contacts now being made of the presidents' offices that representation at this meeting should be at the highest passenger traffic level * * *."

On April 29, 1955, the day after the Bone-Smart conversation, President Johnston of the I. C., Smart's superior, went to Washington, D. C., met with Cross and asked him if it was true that he was going to go with Keeshin in an executive capacity if Keeshin secured the transfer contract. Cross said the story was true.

President Gurley of the Santa Fe also stated in affidavit and in testimony that he heard statements prior to June, 1955, possibly from a railroad man in Washington, that Cross would be associated with Keeshin if the latter secured the transfer contract. In fact, Keeshin conceded that he had a general understanding with Cross which was in existence at the time of the transfer negotiations that Cross could have a position with him when he left the government.

Cross for personal reasons had intervened with the top railroad executives and sought to have the transfer services awarded to Keeshin irrespective of competitive considerations. The committee railroad executives knew of Cross' personal interest in securing an executive post with Keeshin if he got the transfer contract. They were also fully aware that matters of great importance to them were pending before the Interstate Commerce Commission and that Cross would continue to vote in the decision of these cases while he was on the Commission.

Furthermore, Cross had private conversations with these railroad executives concerning specific cases pending before the Commission. Thus, when he visited Simpson in Baltimore and asked him about the Chicago transfer negotiations he also discussed the pending B & O bond financing. This was the largest security refinancing undertaken by any railroad. It resulted in interest savings to the B & O of $3,000,000 per year. The B & O had many substantial reasons for securing Cross' cooperation on this refinancing.

In view of Cross' intervention (and President Perlman's expressed interest) another negotiating meeting was set by the committee chairman, Bone, of the N. Y. C., for May 19, 1955, at which Keeshin and plaintiff would again be heard. Cross had several long distance telephone conversations with Keeshin and then on May 12 and 13 he called President Simpson, B & O, Vice President Carpi, Pennsylvania, and President Feucht, C. N. W. Feucht prepared a memo of this conversation which read in part:

> "Memorandum of my conversation with Hugh Cross, Commissioner, Interstate Commerce Commission, at 4:15 P. M. Friday, May 13, 1955
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> "Hugh Cross stated that he was very much interested in seeing that J. L. Keeshin got the new contract with the railroads here in Chicago to handle baggage and people between the various stations. He understands the contract expires July 1st and there are three bids for the new contract—Willett, Parmelee and Keeshin."

Feucht testified that in the course of this conversation Cross asked him whether he needed a raise in commutation fares but Feucht replied that he had just had one.

The committee met on May 19, 1955 and had in attendance the top passenger executives of the B & O from Baltimore, of the Pennsylvania from Philadelphia and of the I. C. and C. N. W. This was the first time any of these executives had attended such a meeting. At the meeting Keeshin adhered to his original proposal submitted in December 1954. Plaintiff amplified on its March 1955 proposal by withdrawing the traffic escalator clause and submitting maximum coupon rates for the next six years of $1.20, $1.22, $1.23 and $1.24 for the first four years and $1.25 for the remaining two years. The schedule of maximum rates was transmitted to the committee chairman the next day with the notation:

> "To date, Parmelee has served the railroads for 102 years with no written contract, only the rail-

roads' verbal commitment. We are still ready to honor the verbal commitment of the railroads for the next five years as per our understanding, without a written contract unless the railroads desire to have such a contract."

The committee recessed to June 3 in order to secure the views of their executives. Immediately, memoranda recommendations were prepared by the participating committee members for submission to their superiors. Plaintiff found memos in the files of each of the three western railroads on the committee. All recommended the selection of plaintiff because its proposal was superior.

The Santa Fe representative on May 23 recommended plaintiff stating in part:

"There will be a final meeting of the committee on June 3rd to submit a recommendation to all Chicago Terminal Lines. We propose to recommend the continuance of our arrangement with Parmelee because of our long association with that company and its satisfactory transfer of our passengers and baggage between terminals. We believe that the proposal submitted by Mr. Markin is superior to the proposal submitted by Mr. Keeshin because we have assurance of a maximum coupon rate in the fourth and fifth years, and in addition, we will avoid the possibility of labor trouble in connection with operation by a new company with different union."

"We understand that Mr. Keeshin has appealed to the executives of the B & O, Penna., C & N W, and possibly other lines for favorable consideration of his bid."

The C'NW committee representative on May 23 addressed a memo to his Vice President recommending plaintiff, and the Vice President in turn passed the recommendation up to his President with these words:

"It is the view of our passenger people, and I understand the same view is held by the committee members from the other railroads, that Parmelee

should be awarded the contract because of their years of experience, their financial integrity and the fact that they have given us a definite maximum of $1.25 per coupon after the fourth year of the contract."

The Illinois Central recommended plaintiff:

"In view of the fact that both of these proposals are about the same and as no serious complaints have been received in connection with the present Parmelee service, it is my recommendation that we record our expression as favoring the continuation of the Parmelee Service. May I have your approval."

These reports favorable to the selection of plaintiff came after the May 19 meeting. The B & O on April 11 had already prepared a memo for the President detailing the status of the Chicago transfer negotiations and pointing out that "Parmelee assumes responsibility for this service [close connections between trains] and generally does a good job." Keeshin is not mentioned in this memo as a prospective contractor although his proposal was formally before the committee. Furthermore, the New York Central had expressed a very favorable reaction to plaintiff's March 15, 1955 proposal and in summarizing the situation immediately after the May 19, 1955 meeting, the New York Central passenger Vice President noted that both plaintiff and Keeshin were very close in their bidding.

In the case of the Pennsylvania Railroad, no records on the transfer negotiations existed for the period from February 15 to June 14, 1955. [Plaintiff offered to prove that such records had been suppressed.]

On May 23, President Perlman of the NYC called his Chicago Passenger Agent, Bone, and asked about the Chicago transfer situation. This was the first time in Bone's history with the railroad that he had received a call from Perlman or any President. Bone then sent Perlman's office a copy of plaintiff's latest proposal. On May 23 he assumed that Parmelee would be selected, but on May 24 following Perlman's call he dis-

patched a memorandum to New York recommending Keeshin.

During this period there was telephoning between Keeshin and Cross, from Cross to President Simpson and between Keeshin, Cross and Forgash, the president of U. S. Freight Lines, an affiliate of the New York Central.

On May 25, 1955, Cross dispatched three telegrams to the Presidents of the three western railroads whose passenger representatives had recommended the selection of plaintiff, the CNW, I.C. and S.F., which telegrams stated:

> "Expect to be in Chicago between May 31 and June 2 at which time I shall call stop Hope I may have a short chat with you."

Cross came to Chicago on May 31 and stayed to June 3. He first called President Feucht, CNW, and when he found him out of the office left word that he was at the Union League Club. Feucht when he returned told his special counsel, Morehouse, about Cross. Morehouse on June 2 called Cross and visited him in his room at the Union League Club where among other matters they discussed the Transcontinental Class Rate case which was then pending before the Commission. Morehouse reported back to Feucht and late in June 2, Feucht switched the CNW to Keeshin because of the intervention of Cross.

Cross visited President Johnston in his office on June 1 or 2. In the evening of June 2, Smart, passenger agent of the I. C., received a telephone call asking him to canvass the other committee railroads as to their attitude. Smart conducted this canvass between the hours of 7 P. M. and 10 P. M. on June 2. Early in the morning of June 3, Smart attended a meeting with the I. C. passenger traffic Vice President and was instructed to switch to Keeshin.

President Gurley shortly before June 3 asked his executive Vice President to bring him down to date on the transfer negotiations. Gurley had received no previous memoranda on the Chicago transfer matter. He

then received the passenger department's recommendation of plaintiff which made note of the fact that Keeshin had contacted executives of the committee railroads to secure favorable treatment. Gurley instructed his staff to vote for Keeshin and gave no reasons.

In this connection the Vice President in charge of passenger traffic testified that he was asked by the Executive Vice President:

> "whether it was possible without hurting the Santa Fe, to give this contract to Keeshin."

After receiving his instructions, this officer then in turn instructed his committee representative:

> "to vote for him [Keeshin] as a matter of policy."

The committee met on June 3 and unanimously voted for Keeshin.

Cross had made many long distance telephone calls to Keeshin and to railroad executives. All of these calls were either made from his residence or if placed at the Commission were charged to his home phone. Similarly, Cross expended his own funds in the dispatch of telegrams and in his travels to Baltimore, Philadelphia and Chicago.

Cross was to profit personally as follows: First Keeshin arranged to have a U. S. Freight Lines subsidiary buy thirty International Harvester tractors from the Carrolton Farm Supply Agency run by Cross' son on the basis of an override of $150 per tractor, or $4,500. Secondly, Keeshin offered Cross an executive job with his company if he got the transfer contract.

Shortly after Keeshin was awarded the transfer contract, Cross on June 29-30 came to Chicago and selected a house in Deerfield, Illinois, for purchase. He executed a contract of purchase on July 11, 1955, after inserting that "possession [was] to be given buyers by September 15, 1955" (Keeshin's service was to commence October 1, 1955) and transmitted this contract by a personally written letter which stated:

> "Please treat this matter in confidence and withhold the use of my name."

On the same day, July 11, Cross listed his house in North Sumner, Maryland, for sale.

On July 27, Cross transmitted $4,500 as earnest money on his purchase contract of $38,000.

In September, a Senate investigation of Cross' conduct in connection with the Chicago transfer negotiations was instituted and Cross then sought to cancel his contract of purchase. His broker called the seller's attorney and stated:

> "• • • in view of the Senate Committees investigation with reference to Hugh Cross, Mr. Cross was more anxious than ever to drop the deal and would gladly forfeit the $4500 already paid. CWD told Mr. Wilbur that we would not accept the forfeiture of $4500 in lieu of going through with the deal; that we would enforce the contract by a suit for specific performance in the Circuit Court unless the deal was culminated."

Cross moved into the Deerfield house in December 1955, put it up for sale prior to May 1956 and sold the house on May 22, 1956 to an executive officer of defendant, Pennsylvania Railroad.

Cross was subject to a Senate investigation of his conduct. In executive session he admitted he had been indiscreet and resigned his Commission chairmanship to avoid a public hearing.

Defendant railroads had important matters pending for decision before the Interstate Commerce Commission and Cross after his personal contacts with the railroads on behalf of Keeshin continued to participate in the decision of these matters.

Plaintiff also offered to prove the extent of damages which it suffered by reason of the alleged illegal conspiracy.

According to plaintiff's counsel, this case involves the *destruction of a competitive market* which was formerly open to any person willing and able to perform transfer services, but which is now closed and in which *competition* for the rendering of the transfer service *has been elimi-*

nated by a corrupt conspiracy, in violation of §§ 1 and 2 of the Sherman Act.

For many years plaintiff had contracts with the railroads under which it carried through-passengers between the various Chicago railroad stations. It is such a contract that the railroads granted to Transfer in 1955. *City of Chicago* v. *Atchison, T. & S. F. Ry. Co.*, 357 U. S. 77, affirming 240 F. 2d 930, 7th Cir. This contract, being exclusive in its nature, in that sense is a monopoly. However, such a contract is not illegal. *United States* v. *Yellow Cab Co.*, 332 U. S. 218, 229. See, also, *Donovan* v. *Pennsylvania Co.*, 199 U. S. 279, 297.[7]

As we have held, 240 F. 2d 930, at 936-7, the Chicago railroads, when they entered into the exclusive contract with Transfer, were performing duties imposed upon them by the Interstate Commerce Act (49 U. S. C. A. §1, *et seq.*). The Supreme Court said, 357 U. S. 77, at 87:

> "• • • We believe the Act authorizes the railroads to engage in this transfer operation themselves or to select such agents as they see fit for that purpose without leave from local authorities."[8]

In the incidents involved in the case at bar, the railroads were engaged in selecting such agent as they saw fit for transfer service between Chicago stations. However, plaintiff would bring this case within the ambit of *United States* v. *Yellow Cab Co.*, 332 U. S. 218, where the court said, at 229:

> "Any attempt to monopolize or to impose an undue restraint on such a constituent part of interstate commerce brings the Sherman Act into operation. Here there is an alleged conspiracy to bring nearly all the

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7. To the same effect are *Delaware, L. & W. R. R.* v. *Morristown*, 276 U. S. 182, 192; *Black & White Taxi Co.* v. *Brown & Yellow Taxi Co.*, 276 U. S. 518, 528-529. See also *Friend* v. *Lee*, D. C. Cir., 221 F. 2d 96, 100 n. 5.

8. That railroads have the right to select their agent or contractor is implicit. See § 202(c)(2) of the Interstate Commerce Act, 49 U. S. C. A. § 302(c)(2), which holds the railroads liable for the adequate performance of service and obligations of the agent or contractor under the Act. *Status of Parmelee Transportation Co.*, 288 I. C. C. 95, 104.

> Chicago taxicab companies under common control and to eliminate competition among them relative to contracts for supplying transportation for this transfer in the midst of interstate journeys. *Only Parmelee is free to attempt to procure such contracts; Yellow and Cab Sales are forbidden to compete for such contracts*, despite the fact that they conceivably might provide the same transportation service at lower cost to the railroads. The complaint accordingly states a violation of the Sherman Act in this respect. * * *" (Emphasis supplied.)

But the complaint in that case alleged facts showing an absolute bar to competition for the transfer contract. It further showed that that effect was the purpose of an alleged conspiracy.

On the other hand, the record in the case at bar shows quite the contrary. No interested bidder for the contract was prevented from competing for it. Competition, which was formally opened in November, 1954 by solicitation of bids and brought bids from plaintiff, Transfer and Willett, proceeded for more than six months. The competition between plaintiff and Transfer was always intense and finally became feverish. Both competitors made adjustments in their propositions in their eagerness to secure the contract with the railroads. The case made out by plaintiff's offers of proof and evidence reflects the unusual attention which high officials of the railroads bestowed upon the bidding. An assertion that the competitive market for this contract was destroyed or that the competition for it was eliminated is belied by the record. While one competitor succeeded and necessarily the other failed, unmistakably there was very strenuous competition. This unavoidable fact undermines the plaintiff's charges under §§ 1 and 2 of the Sherman Act. Nor is this result precluded by the fact (which a court might well find on the case presented by way of offers of proof) that the victory

of the successful bidder was made easier by the wrongful conduct of a public official. Assuming the record presented as to his involvement reflects the truth (which we are for this purpose required to do), any party damaged thereby has (and would have had, even before the enactment of the Sherman Act) a ground for relief in the courts of this country. However, the use of conventional antitrust language in drafting a complaint will not extend the reach of the Sherman Act to wrongs not germane to that act, even though such wrongs be actionable under state law. We are not concerned with labels. Otherwise, an adroit antitrust lawyer might use his skill in the use of words to convert many unlawful acts into antitrust violations. The antitrust laws were never meant to be a panacea for all wrongs.

In *Apex Hosiery Co.* v. *Leader*, 310 U. S. 469, Apex was a hosiery manufacturer in Philadelphia, a substantial part of its product being shipped in interstate commerce. Respondents were a labor organization and its officers, who were charged with conducting a strike at Apex' factory in violation of the Sherman Act. 15 U. S. C. A. § 1.

The court said, at 483:

> "It is not denied, and we assume for present purposes, that respondents by substituting the primitive method of trial by combat, for the ordinary processes of justice and more civilized means of deciding an industrial dispute, violated the civil and penal laws of Pennsylvania which authorize the recovery of full compensation and impose criminal penalties for the wrongs done. But in this suit, in which no diversity of citizenship of the parties is alleged or shown, the federal courts are without authority to enforce state laws. Their only jurisdiction is to vindicate such federal right as Congress has conferred on petitioner by the Sherman Act and violence, as will appear hereafter, however reprehensible, does not give the federal courts jurisdiction."

Significantly, at 512, the court said:

> "These cases show that activities of labor organizations not immunized by the Clayton Act are not necessarily violations of the Sherman Act. Underlying and implicit in all of them is recognition that the Sherman Act was not enacted to police interstate transportation, or to afford a remedy for wrongs, which are actionable under state law, and result from combinations and conspiracies which fall short, both in their purpose and effect, of any form of market control of a commodity, such as to 'monopolize the supply, control its price, or discriminate between its would-be purchasers.' * * *."

The court further said, at 513:

> "If, without such effects on the market, we were to hold that a local factory strike, stopping production and shipment of its product interstate, violates the Sherman law, practically every strike in modern industry would be brought within the jurisdiction of the federal courts, under the Sherman Act, to remedy local law violations. The Act was plainly not intended to reach such a result, its language does not require it, and the course of our decisions precludes it. The maintenance in our federal system of a proper distribution between state and national governments of police authority and of remedies private and public for public wrongs is of far-reaching importance. An intention to disturb the balance is not lightly to be imputed to Congress. * * *"

Apex was cited with approval in *Eastern Railroad Conference* v. *Noerr Motors*, 365 U. S. 127. *Noerr* recognized, at 142, that, even though the courts below rested their holding that the Sherman Act had been violated upon a finding that the purpose of the railroads was "more than merely an attempt to obtain legislation. *It was the purpose and intent . . . to hurt the truckers in every way possible even though they secured no legislation.*", this

meant no more than that the truckers sustained some direct injury as an incidental effect of the railroads' campaign to influence governmental action and that the railroads were hopeful that this might happen. Thus, the issue presented by the lower courts' conclusion of a violation of the Sherman Act on the basis of this injury was held to be no different than the issue presented by the factors already discussed.

At 144, the court said:

> "* * * No one denies that the railroads were making a genuine effort to influence legislation and law enforcement practices. Indeed, if the version of the facts set forth in the truckers' complaint is fully credited, as it was by the courts below, that effort was not only genuine but also highly successful. Under these circumstances, we conclude that no attempt to interfere with business relationships in a manner proscribed by the Sherman Act is involved in this case."

The court was led to this conclusion, at 145,

> "* * * But the contest itself appears to have been conducted along lines normally accepted in our political system, except to the extent that each group has deliberately deceived the public and public officials. And that deception, reprehensible as it is, can be of no consequence so far as the Sherman Act is concerned. * * *"

In *Hunt* v. *Crumboch*, 325 U. S. 821, 826, the court referring to the Sherman Act, said:

> "* * * That Act does not purport to afford remedies for all torts committed by or against persons engaged in interstate commerce. * * *"

Upon the authority of *Apex*, it added:

> "* * * Whether the respondents' conduct amounts to an actionable wrong subjecting them to liability for damages under Pennsylvania law is not our concern."

For the reasons herein stated, we hold that the claim asserted by plaintiff does not set forth a violation of § 1 or § 2 of the Sherman Act. Therefore we affirm the judgment of the district court.

JUDGMENT AFFIRMED.

DUFFY, *Circuit Judge*, dissenting. The opinion of the District Court shows this case was decided on the ground the "plaintiff has failed to meet its burden of proving public injury, an essential element of its cause of action in this private treble damage suit. Judgment should therefore be entered for the defendants on this ground."

Over the objections of both sides, trial was had on the issue of public injury only. In my opinion, this was error. The case of *Radiant Burners, Inc.* v. *Peoples Gas Light & Coke Co.*, 364 U. S. 656, demonstrates that public injury was an irrelevant issue. The many difficulties which were encountered in and grew out of the trial of the instant case, arose because the learned trial judge insisted that the issue of public injury be tried separately and apart from the other issues in the case.

It is true, the trial judge also held the facts alleged in the complaint and proved and offered to be proved on the trial of the issue of public injury showed no violation of the antitrust laws. The Court ordered "Judgment should be entered for defendants on this *additional ground*." (Emphasis supplied.)

No railroad provides passenger service through Chicago. It is necessary for any through passengers arriving in the city by rail to transfer from one train to another and usually from one station to another. For many years prior to 1955, Parmelee Transportation Company had provided this service.

The complaint alleged a conspiracy among the defendants to eliminate competition in the business of transporting passengers between railroad stations in Chicago and of performing pickup and delivery services. This is the very market and type of restraint which the Supreme Court held violated the Sherman Act in *United States v. Yellow Cab Company*, 332 U. S. 218. The Supreme Court there held that any attempt to impose an undue restraint on this market brings the Sherman Act into operation. It said, 332 U. S. at page 229: "Any attempt to monopolize or to impose an undue restraint on such a constituent part of interstate commerce brings the Sherman Act into operation. . . ."

In the *Yellow Cab* case, the Supreme Court considered as a competitive market "contracts with railroads or railroad terminal associations to transport passengers and their luggage between railroad stations' in Chicago (332 U. S. at page 228)."

It is well established the Sherman Act is applicable to conspiracies of buyers as well as sellers. *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U. S. 219 (see cases cited in footnote 16 on page 235).

The majority opinion apparently recognizes that under the *Yellow Cab* case, a conspiracy among sellers of transfer service is illegal. I am aware of no reasonable basis for holding an identical conspiracy between a group of buyers, a public official and one seller is not likewise proscribed.

I would reverse and remand for trial upon the merits upon all of the issues in the case.

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago 10, Illinois.

Friday, June 30, 1961.

Before

Hon. F. Ryan Duffy, Circuit Judge,
Hon. Elmer J. Schnackenberg, Circuit Judge,
Hon. Latham Castle, Circuit Judge.

Parmelee Transportation Company, a Delaware corporation, *Plaintiff-Appellant,*

No. 13160 *vs.*

John L. Keeshin, et al., *Defendants-Appellees.*

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, with costs, in accordance with the opinion of this court filed this day.

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In the Supreme Court of the United States

OCTOBER TERM, 1961.

No. 431

PARMELEE TRANSPORTATION COMPANY,
A DELAWARE CORPORATION,
Petitioner,

vs.

JOHN L. KEESHIN, RAILROAD TRANSFER SERVICE, INC., HUGH W. CROSS, THE NEW YORK CENTRAL RAILROAD COMPANY, HOWARD E. SIMPSON, PAUL E. FEUCHT, WAYNE A. JOHNSTON, FRED G. GURLEY, THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, THE BALTIMORE AND OHIO RAILROAD COMPANY, CHICAGO & NORTH WESTERN RAILWAY COMPANY, ILLINOIS CENTRAL RAILROAD COMPANY AND THE PENNSYLVANIA RAILROAD COMPANY,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF RESPONDENTS IN OPPOSITION

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SUBJECT INDEX

PAGE

Opinions Below and Jurisdiction 1

Statutes and Rules Involved 2

Questions Presented for Review 2

Statement of the Case 3

Proceedings Below 3

Petitioner's Claim for Relief 3

Argument 7

I. The Conduct Charged Does Not Constitute a Violation of the Antitrust Laws 7

A. The Exclusive Contract Between the Railroads and the Transfer Agent Is Lawful 7

The Yellow Cab Ruling that the Exclusive Contract is Lawful is Reinforced by the Interstate Commerce Act. 9

B. Since the Railroads Had the Right to Enter into the Transfer Contract with an Agent of Their Choice, the Reasons for Their Selection of One Agent Rather than Another Are Immaterial 12

Applicability of the Sherman Act is Not Determined by Reference to Unrelated Laws and Ethical Standards 15

The Opinion Below Does Not Hold Buyers or Third Parties Immune from the Sherman Act (Petition, Point III, p. 15) 18

PAGE

II. The Decision Below Was in Accordance with Proper Judicial Procedure. The Question of Whether the Conduct Plaintiff Charges Constituted a Violation Of the Sherman Act Was Properly Presented for Determination and Review. (Petition, Point II, pp. 12-14.) 19

The Pleadings 19

The Offers of Proof 20

Conclusion 22

TABLE OF CITATIONS

Cases

Apex Hosiery Co. v. Leader, 310 U.S. 469 (1940) 15, 16-17, 18

Arthur v. Kraft-Phenix Cheese Corp., 26 F. Supp. 824 (D. Md. 1937) .....17 n. 15

Black & White Taxi Co. v. Brown & Yellow Taxi Co., 276 U.S. 518 (1928) .....8 n. 10

Central Transfer Co. v. Terminal Railroad Ass'n, 61 F. 2d 546 (8th Cir. 1932), affirmed, 228 U.S. 469 (1933) .....8 n. 10

Chicago, St. L. & N. O. R.R. Co. v. Pullman Southern Car Co., 139 U.S. 79 (1891) .....8 n. 10

City of Chicago v. Atchison, T. & S.F. Ry. Co., 357 U.S. 77 (1958) .....4 n. 1, 9-11

Delaware L. & W. R.R. v. Morristown, 276 U.S. 182 (1928) .....8 n. 10

Depot C. & B. Co. v. Kansas City Terminal R.R. Co., 190 F. 2d 212 (W.D. Mo. 1911) .....8 n. 10

PAGE

Donovan v. Pennsylvania Co., 199 U.S. 279 (1905) 8

Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961) 15-16, 17, 18

Friend v. Lee, 221 F. 2d 96 (D.C. Cir. 1955) .....8 n. 10

Hohensee v. Akron Beacon Journal Publishing Co., 171 F. Supp. 90; 174 F. Supp. 450 (N.D. Ohio 1959), affirmed, 277 F. 2d 359 (6th Cir. 1960) .....17 n. 15

Hoshman v. Esso Standard Oil Co., 263 F. 2d 499 (5th Cir. 1959), cert. denied, 361 U.S. 818 (1959) 19

Hunt v. Crumboch, 325 U.S. 821 (1945) .....17 n. 15

Iron City Produce Co. v. Pennsylvania R.R. Co., 206 I.C.C. 63 (1934) .....11 n. 13

Jaffke v. Dunham, 352 U.S. 280 (1957) 3, 19

Kinnear-Weed Corp. v. Humble Oil & Refining Co., 214 F. 2d 891 (5th Cir. 1954), cert. denied, 348 U.S. 912 (1955) .....17 n. 15

Liggett v. Montgomery Ward & Co., 178 F. 2d 436 (10th Cir. 1949) 19

Radiant Burners, Inc. v. Peoples Gas Light and Coke Co., 364 U.S. 656 (1961) 3

St. Louis, K. & S. R.R. Co. v. United States, 267 U.S. 346 (1925) 19

Sarkes Tarzian, Inc. v. United States, 240 F. 2d 467 (7th Cir. 1957) 21

Transfer In St. Louis and East St. Louis By Dray and Truck, 155 I.C.C. 129 (1929) .....8 n. 10, 11 n. 13

United States v. Employing Plasterers, 347 U.S. 186 (1954) 19

PAGE

United States v. McConnell, No. 13175, in the United States Court of Appeals for the Seventh Circuit (not yet reported) 3

United States v. St. Louis Terminal, 224 U.S. 383 (1912) ..... 8 n. 10

United States v. Yellow Cab Co., 332 U.S. 218 (1947) 4 n. 1, 7-8, 12-13

United States v. Yellow Cab Co., 80 F. Supp. 936 (N.D. Ill. 1948), affirmed, 338 U.S. 338 (1949) ..... 8 n. 9

Western Stockyards v. New York Central R.R. Co., 87 I.C.C. 4 (1923) ..... 11 n. 13

Worcester Excursion Car Co. v. Pennsylvania R.R. Co., 3 I.C.C. 577 (1890) ..... 11 n. 13

Statutes and Rules

Clayton Act, Section 10, 38 Stat. 734, 15 U.S.C. §20 14

Interstate Commerce Act, 24 Stat. 379, as amended, 49 U.S.C. §1 *et seq.*

Section 1(4), 49 U.S.C. §1(4) ..... 1, 10, App. i

Section 3(4), 49 U.S.C. §3(4) ..... 1, 10, App. i

Section 202(c)(2), 49 U.S.C. §302(c)(2) ..... 1, 10, 11, App. ii

Rules of Civil Procedure for the United States District Courts

Rule 12(c) 19

Rule 56 19

Sherman Act, Sections 1 and 2, 26 Stat. 209, 15 U.S.C. §§ 1 and 2 ..... 2, 6, 7, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21

In the
Supreme Court of the United States

OCTOBER TERM, 1961.

No. 431

PARMELEE TRANSPORTATION COMPANY,
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Petitioner,

vs.

JOHN L. KEESHIN, RAILROAD TRANSFER SERVICE, INC., HUGH W. CROSS, THE NEW YORK CENTRAL RAILROAD COMPANY, HOWARD E. SIMPSON, PAUL E. FEUCHT, WAYNE A. JOHNSTON, FRED G. GURLEY, THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, THE BALTIMORE AND OHIO RAILROAD COMPANY, CHICAGO & NORTH WESTERN RAILWAY COMPANY, ILLINOIS CENTRAL RAILROAD COMPANY AND THE PENNSYLVANIA RAILROAD COMPANY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF RESPONDENTS IN OPPOSITION

OPINIONS BELOW AND JURISDICTION

The opinion of the Court of Appeals is reported at 292 F. 2d 794. Otherwise, the statements in the petition as to the opinions below and the jurisdictional requirements are correct.

STATUTES AND RULES INVOLVED

In addition to the statutes and rules set forth in the petition, Sections 1(4), 3(4) and 202(c)(2) of the Interstate Commerce Act (24 Stat. 379, as amended, 49 U.S.C. §§ 1(4), 3(4) and 302(c) (2)) are pertinent. These statutory provisions are set forth in the appendix to this brief.

QUESTIONS PRESENTED FOR REVIEW

1.

(a) Whether the Chicago railroads are prohibited by the Sherman Act from entering into an exclusive contract with an agent of their own choosing for the interchange of passengers and baggage between railroad stations in Chicago.

(b) If not, whether their selection of such an agent was nevertheless a violation of the Sherman Act if it was attended by inducements and motives which were improper or unlawful for reasons extraneous to that Act or its purposes.

2.

Whether these questions were properly presented for determination and review by

(a) a detailed complaint in which plaintiff specifically alleged the ultimate facts on which its claim of antitrust violation was based, and

(b) evidence and offers of proof submitted by plaintiff for the expressed purpose of establishing those ultimate facts.

STATEMENT OF THE CASE

PROCEEDINGS BELOW

The question of whether the trial court erred in ordering a separate trial (over the objection of both sides) of the issue of "public injury" (cf. *Radiant Burners, Inc.* v. *Peoples Gas Light and Coke Co.*, 364 U.S. 656, 660 (1961)), dealt with in detail in petitioner's Statement of Facts (pp. 7-8), is not an issue here. The majority and the minority in the Court of Appeals agreed that this was error (the majority so stated in the related case of *United States* v. *McConnell*, No. 13175 in that court, which is not yet reported), and proceeded to consider the alternative ground stated by the trial court in its judgment order (A. 1754-55), *viz.*, the legal sufficiency of plaintiff's claim under the Sherman Act. This was proper because the court was required to sustain the judgment on any ground supported by the record (*Jaffke* v. *Dunham*, 352 U.S. 280, 281 (1957)).

Both the majority and the minority recognized that the question of the applicability of the Sherman Act was properly before the Court of Appeals. The ultimate facts petitioner claimed constituted a violation of the Sherman Act appear from the detailed factual allegations of its complaint, as well as from its offers of proof, which, contrary to petitioner's repeated erroneous assertion otherwise, were made for the sole purpose of showing a Sherman Act violation. This is demonstrated below at Point II, pp. 19-22.

PETITIONER'S CLAIM FOR RELIEF

The claim on the merits may be concisely stated as follows:

Petitioner, Parmelee Transportation Company, and its predecessors in interest had been the exclusive interstation transfer agent for the railroads in Chicago for many years.[1]

In 1954, the railroads, concerned about rising costs of the service[2] and predictions by Parmelee that costs were likely to go still higher,[3] appointed a committee comprised of the six respondent railroads "to make a study of the transfer situation, including various types of operation that can be devised to definitely meet the needs of the

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[1] Def. Ex. 30, A.A. 192-206 at 197-98, A. 1558; Pl. Ex. 107, Ex. A. 388, A. 1227; A. 281. See also *United States* v. *Yellow Cab Co.*, 332 U.S. 218, 228 (1947). The transfer arrangements were made with the railroads as a group. Def. Ex. 5, 9-13, 15-9, A.A. 72-106, 115-63, A. 1194-95; A.A. 3-4, 5-6; A. 1511; Ex. A. 388; and see *City of Chicago* v. *Atchison, T. & S. F. Ry. Co.*, 357 U.S. 77, 78-79 (1958), to which Parmelee and the corporate respondents were parties.

The printed appendices below have been filed by petitioner pursuant to Rule 21(3). In this brief the abbreviation, "A." refers to petitioner's Appendix, "Ex. A." to its Exhibit Appendix, and "A.A." to respondent's Additional Appendix.

[2] The rate per coupon was increased, in response to demands from Parmelee, from 85¢ (A. 1140-42) to $1.00 in 1948 (A. 1143); to $1.05 in 1952 (A. 1146-47); and (by an agreement made in April, 1954) to $1.12½ beginning January 1, 1954, to $1.20 beginning April 1, 1954, and to $1.22 beginning July 1, 1954 (A. 1154-55).

The railroads absorbed the cost of the service, the passenger receiving a transfer coupon as a part of his through ticket without extra charge (A. 275) (except in the insignificant number of cases in which his journey was shorter than 82 miles on each side of Chicago, A. 1123-25).

[3] The 1954 demand was for $1.25. (A. 1148; A.A. 132-39, 14-15, 7-8.) It was accompanied by representations that Parmelee was losing money (A. 898, A.A. 39), that it needed $1.32 to $1.35 per coupon to break even (A. 1147, 1152-53; A.A. 8-9), and that the charge might soon go to $1.50 (A. 1152, 1399; A.A. 39, 36). Parmelee persisted in refusing to furnish profit-and-loss data or to allow the railroads to examine its books for support for its representations of losses. (A. 1283; A.A. 38-39, 4-5, 6-7, 15.)

public without increasing the cost to the railroads." (A. 1389.) (These six railroads paid over 68 per cent of the total transfer cost. Pl. Ex. 23, Ex. A. 51, A. 674-75.) The committee contacted some twelve transportation firms considered large enough to handle the transfer service (A. 1159; A.A. 42; Ex. A. 18), one of whom was respondent Keeshin.

In response to the committee's solicitation, Keeshin submitted a proposal providing for a lower initial rate than Parmelee was then charging[4] and for certain improvements in the service.[5] In view of the capital outlay required to enter the business, a five-year term was proposed. (Ex. A. 346.) A few months later, in March 1955, Parmelee submitted its proposal for a six and one-half year contract, in which it offered to reduce its initial rate to match Keeshin's offer but did not offer to match the improvements in service proposed by Keeshin.[6]

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[4] The rate offered was $1.20 per coupon for the first year (as compared with the $1.22 Parmelee was then charging) and $1.22 and $1.23 for the second and third years respectively. The rates for the fourth and fifth years were geared to employees' wages. (Pl. Ex. 97, 98, Ex. A. 346, 356, A. 1086-87.)

[5] Including all new equipment, replacement of passenger equipment every thirty months, air conditioning of passenger equipment and two-way radio dispatching. (Ex. A. 343-44.) Keeshin, in contrast to Parmelee, also offered to open his books and records to the railroads. (A. 1292.)

[6] Pl. Ex. 95, Ex. A. 336-39, A. 1086. In its proposal petitioner also sought a 1¢ per coupon increase for each 1% decrease in the number of passengers transferred. (Ex. A. 338.) Although this was unacceptable to the railroads (A. 1166), petitioner persisted in it until two months later (A. 1178-79), when it at last receded and, shortly thereafter, offered to match the second and third-year rates Keeshin had offered and to place a ceiling on the rates for subsequent years (Pl. Ex. 96, Ex. A. 340, A. 1086). It should also be noted that Keeshin had a three-year contract with his labor (Pl. Ex. 98, Ex. A. 356, A. 1087), while Parmelee's labor contract was about to expire; and that a strike (such as had occurred in 1950, A. 1138, 908) and picketing of railroad stations were threatened (A. 1413-17).

The foregoing facts are not subject to dispute. The subsequent events are in dispute, but we assume here, as did the courts below, that petitioner's version of these events is true.

Petitioner contends that, after the events described above, Keeshin brought about his selection by inducing Hugh W. Cross (then a member of the Interstate Commerce Commission) to intercede with the six railroads on his behalf; and that Keeshin improperly influenced Cross to do so, and Cross, to induce those railroads to act favorably to Keeshin, promised them favors in matters pending before the Interstate Commerce Commission. (Appendix to Petition, pp. 7a-16a; A. 1745-46.)

The substantive question of law in this case is whether, this conduct (assuming for present purposes that it occurred) violated the Sherman Act, which is the sole basis for the action. No relief is sought under any other statute or common law principle.

ARGUMENT

I.

The Conduct Charged Does Not Constitute A Violation Of The Antitrust Laws

The decision of the Court of Appeals is not in conflict with any decision of this Court. The Court correctly decided the narrow issue of whether the Sherman Act applies.

A.

THE EXCLUSIVE CONTRACT BETWEEN THE RAILROADS AND THE TRANSFER AGENT IS LAWFUL

The decision of the Court of Appeals is not, as petitioner asserts (Petition, pp. 9, 16), in conflict with *United States* v. *Yellow Cab Co.*, 332 U.S. 218 (1947). On the contrary, the *Yellow Cab* case, read with the other pertinent decisions of this Court discussed in B, below (pp. 15-18), required the Court of Appeals to hold the Sherman Act inapplicable.

In the *Yellow Cab* case, this Court expressly recognized that this same Chicago transfer arrangement, when Parmelee rather than Keeshin was the exclusive agent,[7] was not unlawful.

What the Court held unlawful in the *Yellow Cab* case (pp. 228-29) was the conspiracy between Parmelee and its cab company affiliates to prevent any potential bidder other than Parmelee from bidding for the transfer contract.[8] But the Court made it clear that it was not con-

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[7] The exclusive arrangement Parmelee and its predecessors had with the railroads for many years is identical in all pertinent respects with the contract between respondent Railroad Transfer and the railroads. (A. 1743; see footnote 1.) Parmelee's proposal (the rejection of which is the basis for this action) sought a six and one-half year continuance of this exclusive arrangement. (Ex. A. 388, 337.)

[8] This holding and its inapplicability in the case at bar are discussed under B, below, at pp. 12-13.

demning the long-standing practice of the railroads of making an exclusive contract with a single agent to perform the transfer service. The Court, after noting (p. 228) that "Parmelee's contracts are exclusive in nature," stated (p. 229):

> "It is true, of course, that the exclusive contracts for the transportation service in question are not illegal. *Donovan* v. *Pennsylvania Co.*, 199 U.S. 279."[9]

The *Yellow Cab* case stands squarely for the principle that, as stated in the cited *Donovan* case, railroads have the absolute right and discretion to select an exclusive agent for performance of a railroad transportation service such as interstation transfer, and that consequently the antitrust laws are not violated when that right is exercised. Therefore, the railroads could have selected an exclusive agent to render the transfer service without seeking competitive bids. They are not answerable to disappointed bidders. Their responsibility is to supply an adequate service to the public.[10]

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[9] On remand, this ruling was followed by the district court, *United States* v. *Yellow Cab Co.*, 80 F. Supp. 936, 944 (N.D. Ill. 1948), whose judgment was affirmed by this Court, 338 U.S. 338 (1949).

[10] Other decisions in accord with the *Yellow Cab* and *Donovan* rulings are *Delaware L. & W. R.R.* v. *Morristown*, 276 U.S. 182, 189 (1928); *Black & White Taxi Co.* v. *Brown & Yellow Taxi Co.*, 276 U.S. 518, 528-29 (1928); *Depot C. & B. Co.* v. *Kansas City Terminal R.R. Co.*, 190 F. 2d 212, 214 (W.D. Mo. 1911). See also *Friend* v. *Lee*, 221 F. 2d 96, 100, n. 5 (D.C. Cir. 1955); Anno. 15 A.L.R. 56 (1951); and see *Chicago, St. L. & N. O. R.R. Co.* v. *Pullman Southern Car Co.*, 139 U.S. 79 (1891). The right of the railroads to enter into a joint arrangement for railroad terminal facilities such as the interstation transfer service is also recognized in *United States* v. *St. Louis Terminal*, 224 U.S. 383, 402, 410 (1912); *Transfer In St. Louis and East St. Louis By Dray and Truck*, 155 I.C.C. 129, 143-44 (1929); see also *Central Transfer Co.* v. *Terminal Railroad Ass'n*, 61 F. 2d 546, 550 (8th Cir. 1932) (affirmed, 228 U.S. 469 (1933)).

The Yellow Cab Ruling That The Exclusive Contract is Lawful is Reinforced by the Interstate Commerce Act.

The necessity that the railroads make the kind of arrangements they had with Parmelee and later with Keeshin's company was recently explained by this Court in *City of Chicago* v. *Atchison, T. & S. F. Ry. Co.*, 357 U.S. 77, 78-79 (1958) (the Parmelee ordinance case).[11] There, it will be recalled, the Court held invalid the Chicago city ordinance (which had resulted from a communication by Parmelee to city officials) excluding any transfer company other than Parmelee from using the city streets for transfer purposes. The Court said:

> "Chicago is one of the Nation's great rail centers. Each day thousands of railroad passengers travel through that City on continuous journeys from one State to another. Since the lines of all railroads which carry passengers into and out of Chicago come to an end in one of that City's eight terminals, through passengers frequently arrive at a station different from the one where they are to board their outgoing train and must transfer with their baggage in order to continue their trip. Because of the serious problems of scheduling and passenger convenience involved in this interchange, the railroads, as a group, have long provided for the transfer of through passengers from one station to another by a systematic and highly organized motor carrier operation. Generally the passengers receive a coupon covering this transfer service, without special charge, as part of their through ticket.
>
> "For many years the railroads had an arrangement with Parmelee Transportation Company under which

[11] Petitioner Parmelee and the corporate respondents were all parties in that case.

> it carried through passengers between stations. Apparently finding its service no longer desirable, the railroads notified Parmelee in June 1955 that they would discontinue using its transfer vehicles as of October 1, 1955. Subsequently they engaged Railroad Transfer Service, a corporation specially organized at their request for that purpose, as their exclusive transfer agent for a five-year period commencing with the termination of Parmelee's service." (357 U.S. at 78-79.)

Turning to the question of whether the transfer service is covered by the Interstate Commerce Act, the Court stated that Sections 1(4) and 3(4) of the Act (49 U.S.C., §§ 1(4), 3(4)) "not only authorize the railroads to take all reasonable and proper steps for the transfer of persons and property between their connecting lines but impose an affirmative obligation on them in this respect." The Court added that the transfer service "is at least authorized, if not actually required under the Act as a reasonable and proper facility for the interchange of passengers and their baggage between connecting lines."[12] The Court also referred to Section 202(c)(2) of the Act (49 U.S.C. § 302(c)(2)) as providing "that motor vehicle transportation between terminals, whether performed by a railroad or by an agent or contractor of its choosing, shall be regarded as railroad transportation. . . . " The Court concluded:

> "We believe the Act authorizes the railroads to engage in this transfer operation themselves or to select such agents as they see fit for that purpose without leave from local authorities." (357 U.S. at 87.)

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[12] Whether the service is required (see Petition, p. 16, footnote) is immaterial, since it is "at least authorized" and thus covered by the Act.

While the Interstate Commerce Act allows the railroads in certain circumstances to perform services covered by the Act through an agent or contractor (as here, under Section 202(c)(2)), it looks solely to the railroads for adequate performance of the service and their obligations under the Act. From this sole responsibility of the carriers arises the rule that they have an unqualified right to select the contractor.[13] It was on this principle that the decision in the Parmelee ordinance case rested. The Court said (357 U.S. at 88):

> "Serious impediments to the efficient and uninterrupted flow of this traffic might well result if the City could deny the railroads the right to transfer passengers by their own vehicles or by those of their selected agents. For example, the railroads here undoubtedly have a better understanding of how to handle the transportation problems involved in expeditiously moving thousands of passengers from station to station each day than do local officials. Because of close time schedules, the great volume of traffic and its irregular ebb and flow, the railroads obviously need a cooperative and dependable transfer operator with suitable equipment who is willing to work in close harmony with them. The railroads have rejected as unsuitable the only transfer service now licensed to operate by the City. If local officials can prevent them from providing this service by some other means a breakdown in the organized transfer of passengers could result. At a minimum they would be forced to deal once again with the rejected operator."

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[13] A long line of Interstate Commerce Commission decisions applies this principle. *E.g., Worcester Excursion Car Co.* v. *Pennsylvania R.R. Co.*, 3 I.C.C. 577, 590 (1890); *Transfer In St. Louis and East St. Louis by Dray and Truck*, 155 I.C.C. 129, 141 (1929); *Western Stockyards* v. *New York Central R.R. Co.*, 87 I.C.C. 4, 7 (1923); *Iron City Produce Co.* v. *Pennsylvania R.R. Co.*, 206 I.C.C. 63, 69 (1934).

The Court of Appeals in the case at bar did not grant an immunity from the antitrust laws to railroads, as petitioner asserts (Petition, Point IV, p. 16). Its holding on the railroad's right to engage an exclusive transfer agent followed the settled law that railroads have a right to act as a group to provide joint terminal facilities required or authorized by the Interstate Commerce Act. The right of the railroads as a group to enter into the transfer contract with an agent of their choice is clear.

B.

SINCE THE RAILROADS HAD THE RIGHT TO ENTER INTO THE TRANSFER CONTRACT WITH AN AGENT OF THEIR CHOICE, THE REASONS FOR THEIR SELECTION OF ONE AGENT RATHER THAN ANOTHER ARE IMMATERIAL.

In the *Yellow Cab* case Parmelee and its cab company affiliates were charged with collusive bidding, *i.e.*, an agreement that only Parmelee would offer to perform the transfer service. This Court, after pointing out that "exclusive contracts for the transportation service in question are not illegal," continued (332 U.S. at 229):

> "But a conspiracy to eliminate competition in obtaining those exclusive contracts is what is alleged in this case, and it is a conspiracy of that type that runs afoul of the Sherman Act."

When read superficially and out of context, this language may seem, as it did to the dissenting judge below, to be broad enough to encompass any kind of elimination of competition; but when read in the context of the *Yellow Cab* case, the Court's words clearly refer to the collusive bidding there charged.

Read in its context, this language does not support the proposition that the Sherman Act is violated by a buyer's award of a contract (on which he is under no obligation to accept competing bids at all) to one of two competing sellers for a reason other than the relative merits of their offers.

In the case at bar there is elimination of competition only in the sense that when one exclusive agent was selected, whatever the reason for the selection, the others were necessarily "excluded." This was precisely the effect of the railroads' engaging Parmelee as the exclusive agent for many years prior to 1955. Yet the exclusive arrangement having this inevitable effect was found lawful in the *Yellow Cab* case itself. Competition would have been eliminated to the same extent if Parmelee's, instead of Keeshin's, bid for the exclusive contract had been successful. The only difference would be that Keeshin's competition would have been eliminated.

The effect of the exclusive transfer contract in eliminating competition was exactly the same whether the inducements and motives for entering into it with Keeshin instead of Parmelee were proper, or, as Parmelee charges and as we assume for present purposes, improper. Yet Parmelee's charge, when analyzed, is simply that these inducements and motives were improper for reasons extraneous to the Sherman Act.

Since this is Parmelee's charge, this is what it means when it speaks of "a conspiracy between six railroads

having terminal stations in Chicago, a member of the Interstate Commerce Commission and a seller-competitor of petitioner to suppress competition for the rendering of transfer services on behalf of all twenty-one terminal railroads in Chicago and to monopolize a constituent part of interstate commerce." (Petition, p. 2 and *passim*). Petitioner's semantic device of describing the ultimate facts in the language of the antitrust laws does not answer, it begs, the question of whether they constitute an antitrust violation.

Plaintiff's legal position, stripped of antitrust jargon, is that if one of two or more bidders for a lawful contract in interstate commerce exerts influence on the buyer apart from urging the merits of his bid, and if the buyer yields to that influence, then everyone involved has violated the Sherman Act. This is, in effect, to contend that the Sherman Act requires award of all such contracts to the lowest responsible bidder. However, when Congress intends this in an antitrust statute, it says so specifically, as it did in Section 10 of the Clayton Act (15 U.S.C. §20) which requires competitive bidding in certain cases. There is no authority which remotely supports petitioner's contention.

The legal issue would be precisely the same if there were no claim that Cross participated, and if, instead, it were contended that Keeshin obtained the contract by directly offering the railroads some improper inducement. The successful bidder's use of the instrumentality of a third party to induce the buyer to award him the contract adds no material element. Plaintiff is complaining of the

nature of the inducement allegedly used by the successful bidder and the alleged motives of the buyer in making the selection.

Applicability of the Sherman Act is Not Determined by Reference to Unrelated Laws and Ethical Standards.

The Sherman Act is aimed at restraints of trade. Its applicability is determined by standards found in the Act and the decisions interpreting it, not in other laws extraneous to the Act or its purposes. Conduct which is not covered by the Sherman Act is not brought within the Act's scope merely because it is accompanied by conduct which is unlawful or improper for reasons unrelated to the Act. *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); *Apex Hosiery Co.* v. *Leader*, 310 U.S. 469 (1940).

In the *Noerr* case, this Court held that group solicitation by certain railroads of legislation and law enforcement injurious to their competitors in the trucking industry did not violate the Sherman Act.[14] The courts below had held, *inter alia*, that nevertheless the Sherman Act was violated because of the defendants' use of the so-called third-party technique, which consisted, in this Court's words, of giving "propaganda actually circulated by a party in interest the appearance of being spontaneous declarations of independent groups." While agreeing that

[14] It is to be noted that the opinion of the trial court in the *Noerr* case (113 F. Supp. 737 (E.D. Pa. 1953)), whose judgment this Court reversed, was heavily relied upon by District Judge Sullivan (144 F. Supp. 480, 484, 485) in overruling the motions to dismiss in the instant case, in the opinion from which petitioner quotes. (Petition, p. 6).

this third-party technique was unethical, this Court said it did not follow that the Sherman Act was violated by activities of this nature "simply because those activities have a commercial impact and involve conduct that can be termed unethical." (365 U.S. at 141.) The Court held: " . . . that deception, reprehensible as it is, can be of no consequence so far as the Sherman Act is concerned." (365 U.S. at 145.)

The Court further held that even if the sole purpose of the railroads in seeking the passage and enforcement of laws "was to destroy the truckers as competitors for the long distance freight business," this could not "transform conduct otherwise lawful into a violation of the Sherman Act." (365 U.S. at 139.) Nor, held the Court, was such a transformation affected by the fact that, as the trial court had found, "the purpose of the railroads was 'more than merely an attempt to pass legislation. It was the purpose and intent . . . to hurt the truckers in every way possible, even though they secured no legislation.'" Observing that this meant that the campaign inevitably caused injury to some truckers and the railroads were hopeful this would happen, the Court said, "To hold that the knowing infliction of such injury renders the campaign itself illegal would thus be tantamount to outlawing all such campaigns." (365 U.S. at 143.)

In the *Apex* case (310 U.S. 469), which is cited with approval in the *Noerr* opinion (365 U.S. at 136), it was contended that the defendants had violated the Sherman Act by conspiring to stop the operation of the plaintiff's factory by a sit-down strike. This Court, while recognizing that the strike restrained the movement of goods in interstate commerce, held that nevertheless this was not the kind of restraint of commerce which the Sherman Act was designed to prohibit. In the *Apex* case, as here, it

was contended that the presence of conduct (there violence) which was unlawful under some other law brought the Sherman Act into play. The Court rejected this contention, saying:

> "The Sherman Act is concerned with the character of the prohibited restraints and with their effect on interstate commerce. It draws no distinction between the restraints effected by violence and those achieved by peaceful but oftentimes quite as effective means. Restraints not within the Act, when achieved by peaceful means, are not brought within its sweep merely because, without other differences, they are attended by violence." (310 U.S. at 513.)

The *Noerr* and *Apex* cases, and other cases as well,[15] recognize that the Sherman Act does not apply to every wrong or crime that affects interstate commerce. Trespass, the forcible seizure of property, homicide, other acts of violence, and bribery are concededly unlawful; but they are not in and of themselves a basis for antitrust liability, even if the acts are done in concert and are intended to and do have commercial consequences.

In following the *Noerr* and *Apex* decisions, the Court of Appeals did not hold, as petitioner asserts, "that because respondent Cross violated some other law, neither he nor his fellow conspirators can be sued under the provisions of the Sherman Act." (Petition, Point III, p. 15.) It

---

[15] In accord with the *Noerr* and *Apex* cases in holding that conduct which is not otherwise within the Sherman Act is not violative of the Act because it is attended by violence or conduct improper under some other law or ethical code, are *Kinnear-Weed Corp.* v. *Humble Oil & Refining Co.*, 214 F. 2d 891, 894 (5th Cir. 1954), *cert. denied*, 348 U.S. 912 (1955); *Arthur* v. *Kraft-Phenix Cheese Corp.*, 26 F. Supp. 824, 828 (D. Md. 1937); *Hohensee* v. *Akron Beacon Journal Publishing Co.*, 171 F. Supp. 90, 92, 174 F. Supp. 450 (N.D. Ohio 1959), affirmed, 277 F. 2d 359 (6th Cir. 1960); see also *Hunt* v. *Crumboch*, 325 U.S. 821, 826 (1945).

held, as did this Court in the *Noerr* and *Apex* cases, that conduct which was not otherwise within the Sherman Act was not brought within that Act because it violated some other law or ethical standard extraneous to the Sherman Act.

The Opinion Below Does Not Hold Buyers or Third Parties Immune from the Sherman Act (Petition, Point III, p. 15)

The opinion of the Court of Appeals does not hold, as petitioner erroneously states, that a conspiracy of buyers, as opposed to sellers, has any immunity from the Sherman Act, or that a conspiracy between buyers and third parties has such immunity. (See Petition, p. 10.) It simply holds, correctly, that the conduct charged here (*viz.*, causing the award of a contract to one contractor rather than his competitor by an improper inducement extraneous to the antitrust laws) is not within the Sherman Act. That it may violate some other law, and so constitute a conspiracy for that purpose, "can be of no consequence so far as the Sherman Act is concerned." *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., supra*, 365 U.S. 127, 145 (1961).

II.

THE DECISION BELOW WAS IN ACCORDANCE WITH PROPER JUDICIAL PROCEDURE. THE QUESTION OF WHETHER THE CONDUCT PLAINTIFF CHARGES CONSTITUTED A VIOLATION OF THE SHERMAN ACT WAS PROPERLY PRESENTED FOR DETERMINATION AND REVIEW. (Petition, Point II, pp. 12-14.)

The decision below was not a departure from the accepted and usual course of judicial proceedings. It was the duty of the Court of Appeals to sustain the judgment on any ground which found support in the record. *Jaffke* v. *Dunham*, 352 U.S. 280, 281 (1957). Both the majority and the minority in the Court of Appeals recognized that the question of the applicability of the Sherman Act was properly before the Court. That question was presented by the pleadings, and it was also presented by the offers of proof made for the stated purpose of proving an anti-trust violation.

THE PLEADINGS

Under the Federal Rules, a complaint which alleges, even in the form of conclusions, "every element necessary to recovery" will not be dismissed as insufficient. *United States* v. *Employing Plasterers*, 347 U.S. 186, 189 (1954). However, when the plaintiff has elected to plead in detail the facts upon which he bases his claim for relief, the court can and should determine whether they are legally sufficient. *Hoshman* v. *Esso Standard Oil Co.*, 263 F. 2d 499, 502 (5th Cir. 1959), cert. denied, 361 U.S. 818 (1959); see also *St. Louis, K. & S. R.R. Co.* v. *United States*, 267 U.S. 346, 350 (1925); *Liggett* v. *Montgomery Ward & Co.*, 178 F. 2d 436, 439 (10th Cir. 1949). If this were not so, there could never be a judgment on the pleadings or summary judgment based on a motion without supporting affidavits. (See Rules 12(c) and 56 of the Federal Rules of Civil Procedure.)

Here the ultimate facts petitioner claims constitute a violation of the antitrust laws are pleaded in detail in the complaint. (A. 4-11.) The addition of the conclusion that defendants conspired to restrain trade and monopolize, does not change the facts alleged, even assuming that these conclusions would have been sufficient, in the absence of a complete detailing of the facts, to withstand a motion directed at the complaint. The courts below properly determined from the facts alleged in the complaint that plaintiff is charging, not a violation of the Sherman Act, but a violation of other and unrelated laws and moral principles.

THE OFFERS OF PROOF

Petitioner's offers of proof, together with the evidence received, are a second and independent basis for the entry of judgment. Contrary to petitioner's repeated erroneous assertions otherwise (Petition, pp. 8, 12-13), these offers were made for the stated purpose of establishing the violation of the antitrust laws alleged in the complaint. Petitioner's position, as stated to the trial court, was that if the offers established a violation of the antitrust laws, then proof of public injury was unnecessary (A. 445-46, 589), and, further, that it had to prove a violation in order to establish a basis for review (A. 389).

Thus, in contrast to the position petitioner now advances (Petition, pp. 8, 12-13), petitioner's counsel said at the trial that petitioner's offer of proof "hasn't anything to do with the issue" of public injury as defined by the trial court (A. 593), and that the offer was being made because ". . . I don't want the upper court saying, when we get up there, ' . . . You are talking about an academic issue, because you never offered any proof of conspiracy. . . . You have nothing in the record here upon which you can go up.' " (A. 589, 594.) Petitioner's counsel expressly stated in making

their offers of proof that their sole purpose was to establish the violation of the Sherman Act alleged in the complaint. (A. 443, 512, 589, 594.) They even offered evidence on the damages plaintiff had allegedly suffered, because, as they said, "in our opinion, in order to establish a breach of the antitrust laws, it is necessary for the plaintiff to show that they had some injury." (A. 1092.)

No inferences adverse to petitioner were drawn by the courts below. On the contrary, those courts reached their decisions, in the words of the judgment order, " . . . viewing such evidence and offers of proof in the light most favorable to plaintiff, and making all reasonable inferences therefrom in favor of plaintiff." (A. 1755; see also Appendix to Petition, pp. 4a, 19a.) Thus *Sarkes Tarzian, Inc.* v. *United States*, 240 F. 2d 467, 470 (7th Cir. 1957) (Petition, p. 14) has no application.

The statement of the assumed facts in the opinion of the Court of Appeals (Appendix to Petition, pp. 7a-16a) was taken, as the court stated, from the brief of petitioner's counsel in that court. This statement in turn is based upon the uninhibited narrative offers of proof made by petitioner's counsel at the trial. It is inconceivable that the evidence or the ultimate facts could be stated in a light more favorable to petitioner than they were in this statement of its counsel, which was necessarily designed to present the strongest possible showing to the Court of Appeals. That court accepted counsel's statement at its face value.

Petitioner does not say it has additional evidence not referred to in its offers of proof. But whether it has is immaterial. The courts below did not weigh conflicting evidence. They assumed that the offers of proof established the ultimate facts claimed by petitioner. There

were no issues of fact for a jury to decide. The question was simply whether those ultimate facts, assuming they did occur, constituted a violation of the Sherman Act.

The action of the Court of Appeals in determining the applicability of the Sherman Act was proper. There are no procedural questions in the case which call for the exercise of this Court's supervisory jurisdiction.

CONCLUSION

The decision of the Court of Appeals correctly applies the principles laid down in this Court's decisions to the narrow question involved in this case. The court followed proper judicial procedure. No question of importance or of general applicability is presented. Further review is not merited.

Respectfully submitted,

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APPENDIX

Interstate Commerce Act, § 1(4), 49 U.S.C. § 1(4):

Duty to furnish transportation and establish through routes; division of joint rates. It shall be the duty of every common carrier subject to this chapter to provide and furnish transportation upon reasonable request therefor, and to establish reasonable through routes with other such carriers, and just and reasonable rates, fares, charges, and classifications applicable thereto; and it shall be the duty of common carriers by railroad subject to this chapter to establish reasonable through routes with common carriers by water subject to chapter 12 of this title, and just and reasonable rates, fares, charges, and classifications applicable thereto. It shall be the duty of every such common carrier establishing through routes to provide reasonable facilities for operating such routes and to make reasonable rules and regulations with respect to their operation, and providing for reasonable compensation to those entitled thereto; and in case of joint rates, fares, or charges, to establish just, reasonable, and equitable divisions thereof, which shall not unduly prefer or prejudice any of such participating carriers.

Interstate Commerce Act, § 3(4), 49 U.S.C. § 3(4):

Interchange of traffic. All carriers subject to the provisions of this chapter shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines and connecting lines, and for the receiving, forwarding, and delivering of passengers or property to and from connecting lines; and shall not discriminate in their rates, fares, and charges between

connecting lines, or unduly prejudice any connecting line in the distribution of traffic that is not specifically routed by the shipper. As used in this paragraph the term "connecting line" means the connecting line of any carrier subject to the provisions of this chapter or any common carrier by water subject to chapter 12 of this title.

Interstate Commerce Act, § 202 (c)(2), 49 U.S.C. § 302 (c)(2):

Application of provisions.

. . .

(c) Notwithstanding any provision of this section or of section 303 of this title, the provisions of this chapter [Chapter 8 of the Act, regulating motor carriers], except the provisions of section 304 of this title relative to qualifications and maximum hours of service of employees and safety of operation and equipment, shall not apply—

. . .

(2) to transportation by motor vehicle by any person (whether as agent or under a contractual arrangement) for a common carrier by railroad subject to chapter 1 of this title, an express company subject to chapter 1 of this title, a motor carrier subject to this chapter, a water-carrier subject to chapter 12 of this title, or a freight forwarder subject to chapter 13 of this title, in the performance within terminal areas of transfer, collection, or delivery service; but such transportation shall be considered to be performed by such carrier, express company, or freight forwarder as part of, and shall be regulated in the same manner as, the transportation by railroad, express, motor vehicle, or water, or the freight forwarder transportation or service, to which such services are incidental.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961.

No. 431

PARMELEE TRANSPORTATION COMPANY,
A DELAWARE CORPORATION,
Petitioner,

vs.

JOHN L. KEESHIN, RAILROAD TRANSFER SERVICE, INC., HUGH W. CROSS, THE NEW YORK CENTRAL RAILROAD COMPANY, HOWARD E. SIMPSON, PAUL E. FEUCHT, WAYNE A. JOHNSTON, FRED G. GURLEY, THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, THE BALTIMORE AND OHIO RAILROAD COMPANY, CHICAGO & NORTH WESTERN RAILWAY COMPANY, ILLINOIS CENTRAL RAILROAD COMPANY AND THE PENNSYLVANIA RAILROAD COMPANY,
Respondents.

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INDEX.

PAGE

Statement of the Case 1

Argument:

I. The Conduct Charged Is a Classic Example of Antitrust Violation and the Decision Below Is Squarely in Conflict With This Court's Decision in the Yellow Cab Case 5

A. The Exclusive Contract Between the Railroads and the Transfer Agent Is Unlawful Because It Created a Monopoly and Because It Came About Through a Conspiracy 5

B. The Railroads Had No Right to Conspire to Prevent Competitors Equipped to Compete From Competing for the Right to Perform the Transfer Service 9

II. The Decision Below Violated Every Principle of Proper Judicial Procedure and Destroyed Petitioner's Right to a Jury Trial 12

Conclusion 16

CITATIONS.

Apex Hosiery Co. v. Leader, 310 U. S. 469 (1940) ..11, 12

City of Chicago v. Atchison, T. & S. F. Ry. Co., 357 U. S. 77 (1958) 8, 9

Donovan v. Pennsylvania Co., 199 U. S. 279 (1905) .. 8

Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., 365 U. S. 127 (1961) 11, 12

Status of Parmelee, 288 I. C. C. 95, 98 (1953) 9

United States v. McConnell, Docket No. 498 in the United States Supreme Court (not yet reported) .. 2

United States v. St. Louis Terminal, 224 U. S. 383, 402, 410 (1912) 5

United States v. Yellow Cab Co., 332 U. S. 218 (1947) 5, 6, 7, 8, 9, 10

United States v. Yellow Cab Co., 80 F. Supp. 936, 944 (D. C., Ill., 1948), aff'd 338 U. S. 338 (1949) 8

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Respondents.

REPLY BRIEF OF PETITIONER.

STATEMENT OF THE CASE.

(Reply to respondents' brief pages 3 to 6)

Respondents now concede that "the trial court erred in ordering a separate trial * * * of the issue of 'public injury'" (Resp. Br. 3) but assume that the commission of the error can be glossed over and ignored by the Court of

Appeals in determining whether petitioner's rights to a trial by jury have been destroyed.[1]

Moreover, respondents argue as though a full hearing was had and as though petitioner had the opportunity to present its case on the merits. The trial court expressly precluded such a trial. Respondents enumerate alleged facts seeking to justify the railroads' selection of Keeshin on the merits and contend "[t]he foregoing facts are not subject to dispute." (Resp. Br. 6.) But how could petitioner dispute those facts when trial of the conspiracy issue was prohibited. The only undisputed facts are those alleged in the complaint and those allegations emphatically reject respondents' implication that the costs of, and service offered by Keeshin were the reasons for his selection. Thus the complaint alleges that Keeshin was selected

> "regardless of whether the cost and terms proposed by Keeshin for such services were less favorable than could be obtained by them [the railroad defendants] as a result of free competition * * *." (R. 14.)

And further

> "The services performed by Transfer [Keeshin] pursuant to said contract have been and are more costly to said railroads and less extensive and valuable than

---

1. Respondents note that the majority judges of the Court of Appeals agreed that the separate trial of the irrelevant public injury issue was error but only in its opinion in the related case of *United States* v. *McConnell* (unreported but before this Court on Petition for a Writ of Certiorari, Docket No. 498).

It should also be noted that while the majority opinion placed principal reliance upon petitioner's offers of proof on the irrelevant public injury issue to infer the existence of strenuous competition and the absence of an antitrust violation, the same majority in the *McConnell* contempt proceeding found that petitioner's rights to make offers of proof had been completely infringed by the trial court. (See R. 588, 590, 595-7, 603, 607, 626, 733-5, 935, 962-8, 1016.) (See Opinions attached as Appendix to McConnell Petition for Writ of Certiorari, Docket No. 498).

> the services previously performed by plaintiff [petitioner] and which plaintiff had offered to continue to perform." (R. 17.)

In dealing with the petitioner's offers of proof, the majority opinion of the Court of Appeals presumably recited the offers of proof as summarized in petitioner's brief in the Court of Appeals, but significantly omits the fact that Keeshin was selected despite higher proposed costs. The majority recites that:

> "The committee met on June 3 and unanimously voted for Keeshin."

But omits:

> "* * * despite the fact that: The Keeshin proposal provided for a higher transfer coupon rate of charge to the railroads (R. 605, 812-4, 818-9, 1220); the selection of Keeshin at a higher transfer coupon charge violated the sole objective of the negotiations to secure a cut in transfer costs, if possible; and several major issues of Keeshin's rates and services remained unresolved (R. 607-8, 815). The Keeshin contract was irrevocable for 5 years (Pl. Ex. 100, Ex. R. 361-80) despite the importance to the railroads of a clause permitting termination for cause. (R. 608)." (Pl. Br. in Ct. of App. p. 29.)

The material allegations of the complaint, which must be accepted as true, definitively alleges a conspiracy between six railroads, Keeshin and Cross to prevent competition for the transfer business. Parmelee and others were precluded from competing and the 21 Chicago terminal railroads constituting the entire market were caused to execute a joint exclusive, non-cancellable 5 year contract which monopolized that market.

It is in effect conceded by respondents that the complaint in substance and in fact charged that the instigator of the conspiracy was Cross, former chairman of the Interstate

Commerce Commission acting at the behest of defendant Keeshin; that Cross induced the defendant railroads to foreclose competition for the transfer business and do business exclusively with Keeshin; and that the defendant railroads joined the conspiracy in order to influence Cross to give favorable consideration to matters pending before the Commission. (Resp. Br. 6.)

Since the offers of proof admittedly sustain the above allegations the record conclusively shows a successful conspiracy to restrain competition in violation of the Sherman Act.

ARGUMENT.

I.

THE CONDUCT CHARGED IS A CLASSIC EXAMPLE OF ANTITRUST VIOLATION AND THE DECISION BELOW IS SQUARELY IN CONFLICT WITH THIS COURT'S DECISION IN THE YELLOW CAB CASE.

A.

The Exclusive Contract Between the Railroads and the Transfer Agent is Unlawful Because it Created a Monopoly and Because it Came About Through a Conspiracy.

(Reply to Respondents' Brief pages 7 to 12)

Respondents interpret the opinion of the Court of Appeals as holding for their contention that it is "settled law" that the railroads have a right "as a group to enter into the transfer contract with an agent of their choice. * * *" (Resp. Br. 12.) They urge that *Yellow Cab* and other decisions hold "the Sherman Act inapplicable" to such an "exclusive contract". (Resp. Br. 7.)[2]

This position is taken in the face of admitted allegations of conspiracy by the defendants in the procurement of this joint exclusive transfer contract. Respondents' contentions completely corroborate the assertion made in our petition that the Court of Appeals granted the railroads immunity from the operation of the antitrust laws and therefore the decision should be reviewed by this Court by

2. In footnote 10, p. 8 of their brief, respondents say: "The right of the railroads to enter into a joint arrangement for railroad terminal facilities" is recognized in *U. S. v. St. Louis Terminal*, 224 U. S. 383, 402, 410. Actually this court held that the contract between fourteen railroads and a terminal company violated both Sections 1 and 2 of the Sherman Act.

certiorari in order to maintain effective enforcement of the antitrust laws for reasons of manifest public policy.

We urge that the joint exclusory five year contract is illegal standing alone, but irrespective of that position, it is elementary that if it came into existence by virtue of a conspiracy to preclude competition and is a means to effectuate that end, it is illegal under the express provisions of Section 1 of the Sherman Act.

Respondents and the Court of Appeals claim that the instant contract is not only legal standing alone, but in effect overrule the Sherman Act and applicable decisions of this Court by asserting that the fact that the contract was sired in conspiracy to foreclose a competitor is irrelevant.

Further, the opinion of the Court of Appeals and the argument of the respondents is a syllogism based upon a false premise. The premise is that the *Yellow Cab* case held that an exclusive contract such as is here presented is legal under the antitrust laws. That case held no such thing. There the Court found a number of exclusive contracts were illegal when acquired or maintained by conspiracy. There this Court expressly pointed out (332 U. S. at p. 229):

> "* * * a conspiracy to eliminate competition in obtaining those exclusive contracts is what is alleged in this case, and it is a conspiracy of that type that runs afoul of the Sherman Act."

In the instant case, there was one contract proffered, which was joined in by all railroads and provided that no railroad joining in the agreement could contract with any other transfer agent than Keeshin for a period of five years. Each of the railroads surrendered its rights to take independent action with respect to any matter covered by the contract. (R. 16.) It also contained price-fixing

provisions for services paid for by the public directly, which were illegal *per se*. (Ex. R. 370-1, Pl. Ex. 100, Para. 8; Ex. R. 371-3, Pl. Ex. 100, Para. 9; Ex. R. 389-90, Pl. Ex. 108; Ex. R. 392-3, Pl. Ex. 110.)

It is apparent that this Court has not passed on the legality of that contract. The contracts in the *Yellow Cab* case do not remotely resemble it. There Parmelee had oral at-will arrangements with individual railroads and no railroad surrendered its right of individual action or was precluded from dealing with any other transfer agent at any time while such contracts were in force. (R. 16.)

The Parmelee contracts were described by respondents' own witness, Padrick. He said (R. 1126):

> "There was no joint contract. There was no individual contract except, I believe, that there may have been two, and I think those were with the Grand Trunk or the Nickel Plate, I can't remember which, and the Erie. Now there may have been contracts with them, and I am not sure of that."

When asked whether Parmelee's arrangements were for a definite period, Padrick answered (R. 1221):

> "* * * we were working on a day-to-day basis."

Respondents are therefore in error when they assert that the Parmelee arrangements and the present single 5 year exclusory contract are "identical in all pertinent respects." (Resp. Br. 7, Note 7.)

Respondents assert:

> "The *Yellow Cab* case stands squarely for the principle that, as stated in the cited *Donovan* case, railroads have the absolute right and discretion to select an exclusive agent for performance of a railroad transportation service such as interstation transfer, and that consequently the antitrust laws are not violated when the right is exercised." (Resp. Br. 8.)

This contention completely ignores the provisions of the Sherman Act and the holding in the *Yellow Cab* case that there is no right to conspire to foreclose a competitor equipped to compete for a service to be rendered in interstate commerce.

The case of *Donovan* v. *Pennsylvania Co.*, 199 U.S. 279 (1905), which this Court cited in *Yellow Cab*, involved only a single carrier and a single contract with a single transfer agent. It did not create a complete monopoly as does the instant contract, nor did it join together all railroads constituting the market for the petitioner's services.

The restraint charged in the *Yellow Cab* case was far less drastic than that presented here. There it was alleged that three affiliated companies refused to compete among themselves for the transfer business in Chicago.[3] In the instant case, as the result of an admittedly corrupt conspiracy between the six defendant railroads, Keeshin and Cross, all twenty-one competing railroads with terminals in Chicago agreed to deny anyone except Keeshin's company the right to compete for the transfer business in Chicago. Such a conspiracy is obviously illegal, not only because it excludes a competitor equipped to compete, but it also eliminates all possibility of competition and creates a total monopoly of the transfer business in Chicago for at least five years, thus representing as extreme a violation of the Sherman Act as can be imagined.

Respondents cite the case of *City of Chicago* v. *Atchison, T. & S. F. Ry. Co.*, 357 U. S. 77, 78-79 (1958), as authority for declaring the instant conspiracy and resulting contract legal under the antitrust laws. In that case, all that was involved was the validity of a City of Chicago ordinance.

3. At the trial, the court found that the government had failed to establish the existence of such an arrangement or of any restraint on competition. *United States* v. *Yellow Cab Co.*, 80 F. Supp. 936, 944 (D.C. Ill., 1948), aff'd 338 U. S. 338 (1949).

No antitrust issue was presented, urged or ruled upon by this Court. The case obviously is not in point, but its citation both by the Court of Appeals and by respondents discloses a complete lack of support in the precedents for respondents' position.

At pages 10 to 12, respondents argue to the effect that the contract is covered by the Interstate Commerce Act and is therefore immune from attack under the antitrust laws. This contention ignores the fact that the Interstate Commerce Commission had refused to exercise regulatory authority over the transfer operations and held that:

> "The baggage pick-up and delivery service performed by the respondent locally between points and places in the city of Chicago and suburbs is not subject to any provision of the act." (*Status of Parmelee*, 288 I. C. C. 95, 98 (1953).)

B.

The Railroads Had No Right to Conspire to Prevent Competitors Equipped to Compete from Competing for the Right to Perform the Transfer Service.

(Reply to Respondents' Brief pages 12 to 18.)

Respondents concede that the language in *Yellow Cab*, read literally, governs this case, but say the language is limited to the exact factual situation there presented (Resp. Br. 12). However, this Court did not so limit its opinion. It said:

> "Any attempt to monopolize or to impose an undue restraint on such a constituent part of interstate commerce brings the Sherman Act into operation." (332 U. S. at 229.)

And further:

> "The statute is aimed at substance rather than form." (332 U. S. at 227.)

It thus appears that the *Yellow Cab* case establishes that any conspiracy, whether by buyers or sellers or third persons, to eliminate competition in obtaining transfer service contracts in this very market is prohibited by the antitrust laws.

Respondents now concede (Resp. Br. 18) that, as pointed out by Circuit Judge Duffy, there is no immunity under the antitrust laws for "a conspiracy of buyers, as opposed to sellers", and further concede that it cannot be contended "that a conspiracy between buyers and third parties has such immunity."

Now they say (Resp. Br. 13):

> "In the case at bar there is elimination of competition only in the sense that when one exclusive agent was selected, whatever the reason for the selection, the others were necessarily 'excluded.'"

Unfortunately for this contention, the Sherman Act says that if the reason for the selection is an illegal conspiracy, then that restraint falls afoul of the Sherman Act. The respondents' contention obviously ignores the fact that the complaint alleged, and the offers of proof showed, that the reason for the selection of Keeshin was the conspiracy that precluded any consideration being given to the offers of petitioner and others, even though admittedly better than Keeshin's.

Respondents next say (Resp. Br. 13) that the effect on the elimination of competition "was exactly the same whether the inducements and motives for entering into it with Keeshin instead of Parmelee were proper, or, as Parmelee charges and as we assume for present purposes, improper." Here, again, respondents deliberately ignore the effect of the illegal conspiracy in making acts, which standing alone might be legal, completely illegal when done pursuant to a conspiracy to restrain competition.

It is further argued that petitioner is contending that the Sherman Act requires the award of all contracts to the lowest responsible bidder. (Resp. Br. 14.) No such contention has ever been made by the petitioner. All that has been contended is that any competitor in an interstate commerce market is entitled to compete, free of the impediment of a conspiracy directed against such competitor and others having as its purpose to preclude them from any consideration whatever in their competition for the business.

The decisions of this Court in *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U. S. 127 (1961) and *Apex Hosiery Co.* v. *Leader*, 310 U. S. 469 (1940) are urged for the proposition that the respondents are given immunity from the effects of their illegal conduct because Cross, in his intervention into the situation and his inducement of the conspiracy, also violated certain common law rights of the petitioner. There is nothing in the *Noerr* or *Apex* cases which even remotely gives support to such a contention.

In *Noerr* while the Court was unwilling to find a Sherman Act violation based solely upon legislative lobbying no matter how unethical and economically impelled, the decision does stress that a violation of the Sherman Act exists in

> "combinations ordinarily characterized by an express or implied agreement or understanding that the participants will jointly give up their trade freedom, or help one another to take away the trade freedom of others through the use of such devices as price-fixing agreements, boycotts, market-division agreements and other similar agreements." (365 U. S. at p. 136.)

The Court further stated:

> "There may be situations in which a publicity campaign, ostensibly directed toward influencing governmental action, is a mere sham to cover what is actually

> nothing more than an attempt to interfere directly with the business relationships of a competitor and the application of the Sherman Act would be justified." (365 U. S. at p. 144.)

We submit that this Court should lay at rest any such construction of its decisions in the *Noerr* and *Apex* cases as is asserted in the opinion of the Court of Appeals. Obviously, the argument here must mean that if a defendant in an antitrust case violates some other law or statute, by such violation he gains immunity under the antitrust laws. This petition affords this Court the opportunity of correcting any such flagrant misinterpretation of its decisions.

II.

THE DECISION BELOW VIOLATED EVERY PRINCIPLE OF PROPER JUDICIAL PROCEDURE AND DESTROYED PETITIONER'S RIGHT TO A JURY TRIAL.

(Reply to Respondents' Brief pages 19 to 22.)

The Pleadings.

It is conceded that:

> "Under the Federal Rules, a complaint which alleges, even in the form of conclusions, 'every element necessary to recovery' will not be dismissed as insufficient." (Resp. Br. 19.)

Respondents then proceed to argue that if the plaintiff elects to plead in detail the facts, then the court can determine their legal sufficiency. However both the majority and dissenting opinions in the court below concede that if the issue presented was whether or not the pleading was sufficient, the trial court's dismissal of the suit would have to be reversed. A reading of the complaint shows the statement of a classic antitrust violation case.

The Offers of Proof.

While the majority opinion below labors to utilize offers of proof to in some way destroy the allegations in the complaint, a fair reading of the offers of proof, as set forth in the majority opinion, shows that the six railroads who were dealing with the situation were brought together in a conspiracy to preclude any consideration being given petitioner's offer; that they were brought together in this conspiracy at the instigation of a Commissioner of the Interstate Commerce Commission at the behest of the respondent, Keeshin.

Respondents tacitly concede that this attempt by the court below cannot be sustained by the record. They now say (Resp. Br. 22):

> "The question was simply whether those ultimate facts, assuming they did occur, constituted a violation of the Sherman Act."

It is thus conceded that what is presented here is a clear question of law, raising for determination the proper construction of the antitrust laws and whether or not immunity can be gained from the application of those laws by the use of sophistry.

We agree with respondents that there is no conflict between the allegations of the complaint and the proffered proofs and we submit that under every decision rendered by this Court on the question of conspiracy, unity of action by competing railroads to exclude persons from a business in a segment of interstate commerce falls within the definition of a conspiracy and the ambit of the antitrust laws.

Respondents concede that the Court of Appeals could not properly raise inferences from the facts contained in the offers of proof. The court below, however, said:

> "* * * No interested bidder for the contract was pre-

> vented from competing for it. * * * The case made out by plaintiff's offers of proof and evidence reflects the unusual attention which high officials of the railroads bestowed upon the bidding. * * * Nor is this result precluded by the fact (which a court might well find on the case presented by way of offers of proof) that the victory of the successful bidder was made easier by the wrongful conduct of a public official. Assuming the record presented as to his involvement reflects the truth (which we are for this purpose required to do), any party damaged thereby has (and would have had, even before the enactment of the Sherman Act) a ground for relief in the courts of this country."

The majority opinion thus reached a conclusion which we submit is a complete *non sequitur*, i.e., that a conspiracy instigated in the course of contractual negotiations, which has the necessary effect of destroying any consideration of a competitor's bid to obtain the business in interstate commerce, is not actionable under the anti-trust laws merely because it did not have its inception until negotiations for a contract were under way. The mere statement of such an outrageous proposition should, we submit, be sufficient reason for the grant of the writ of certiorari in this case.

The facts alleged and contained in the offers of proof establish an actual restraint of competition. The majority opinion bears this out by reference to "the wrongful conduct of a public official" and "the unusual attention which high officials of the railroads bestowed." As the agreed facts explicitly demonstrate, the presidents of the railroads were brought into the matter by Cross who prevailed upon them to instruct their subordinates to accept Keeshin not on competitive considerations but to realize illicit advantages out of the regulatory processes through Cross. The attention of these high officials was "unusual", the intervention of Cross was "wrongful" and occurred solely for the purpose of preventing competition from working.

The Court of Appeals would deny relief to the victim of a conspiracy in restraint of trade merely because he was not prevented from submitting a bid to which the conspirators had agreed to give no consideration. If this decision is not reviewed, it will stand as a precedent for the denial of the right of a private plaintiff to maintain an antitrust suit for damages to his business and property whenever conspirators elect to go through the formality of receiving competitive offers to conceal their actual intentions. There would be no legal recourse even when negotiations were carried on as a mere pretense and as a planned element of the conspiracy.

Manifestly, this is a completely unjustifed interpretation of antitrust laws and this Court's decisions on the subject.

Conclusion.

The decision of the Court of Appeals in effect nullifies the antitrust laws in the Seventh Circuit, destroys petitioner's right to a jury trial and grants immunity to railroads conspiring among themselves and with outside third parties not subject to interstate commerce or other regulatory acts.

For the reasons stated here and in our original petition, we most respectfully submit that a writ of certiorari should issue.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961.

No. 431

PARMELEE TRANSPORTATION COMPANY,
A DELAWARE CORPORATION,
Petitioner,

vs.

JOHN L. KEESHIN, RAILROAD TRANSFER SERVICE, INC., HUGH W. CROSS, THE NEW YORK CENTRAL RAILROAD COMPANY, HOWARD E. SIMPSON, PAUL E. FEUCHT, WAYNE A. JOHNSTON, FRED G. GURLEY, THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, THE BALTIMORE AND OHIO RAILROAD COMPANY, CHICAGO & NORTH WESTERN RAILWAY COMPANY, ILLINOIS CENTRAL RAILROAD COMPANY AND THE PENNSYLVANIA RAILROAD COMPANY,
Respondents.

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI.

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THE GUTHROP-WARREN PRINTING COMPANY, CHICAGO

IN THE

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Respondents.

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI.

Parmelee Transportation Company, petitioner, prays that this Court grant a rehearing of its order of December 11, 1961, denying the petition for a writ of certiorari (three Justices voting they favored granting the petition) and that a writ of certiorari issue to review the judgment and opinion of the Court of Appeals for the Seventh Circuit in the above-entitled case as prayed for in the Parmelee petition filed herein on September 22, 1961.

REASONS FOR GRANTING REHEARING AND ISSUING THE WRIT.

1. On the day the petition was denied in this case, the Court granted the petition for a writ of certiorari of Thomas C. McConnell, one of petitioner's attorneys, to review a criminal contempt order growing out of the trial of the above entitled cause (Docket 498). A copy of the opinion of the Court of Appeals in the McConnell contempt is printed herewith as an Appendix. As appears from the petitions and the common record in the two cases, McConnell was sentenced for contempt for seeking to make offers of proof at the trial, of the conspiracy charged, pursuant to Rule 43 (c) of the Federal Rules of Civil Procedure. It further appears that because he was so ordered by the trial court, McConnell was forced to abandon the presentation of offers of proof involving the part played by respondent, Hugh W. Cross, in that conspiracy. Notwithstanding, the Court of Appeals affirmed the trial court's dismissal of the suit on the ground that petitioner's offers of proof were insufficient to establish that conspiracy issue. This position was taken despite express recognition by the same Court of Appeals in its contempt opinion that petitioner's attorney

> "* * * with difficulty, was maintaining his client's position, despite the shift in the court's rulings as to the submission of offers of proof in a jury case." (Appendix, p. 4a.)

And the court's acknowledgment of

> "the turbulence under which respondent was required to act in protecting his client's rights." (Appendix, p. 5a.)

The dissenting opinion of Judge Duffy pointed out:

> "The attorneys for plaintiff were driven to a sense of frustration due to the District Court's rulings on offers of proof." (Appendix, p. 13a.)

The Court of Appeals nevertheless affirmed the trial court's blocking of petitioner's offers of proof and at the same time affirmed the dismissal of the case in part at least on the ground that such offers of proof were insufficient to establish a conspiracy in violation of the antitrust laws. Petitioner in this manner was denied due process of law.

The granting of the petition of McConnell in No. 498 presents the situation of this Court's consenting to review the contempt conviction arising from the attorney's attempt to make a record in petitioner's behalf but refusing in No. 431 to review the substantive and unconstitutional results to petitioner occasioned by the trial court's preventing its attorney from making an adequate and proper record.

Review of the McConnell petition, No. 498, involves the same record and related issues as are involved in the companion case of the Parmelee Transportation Company, petitioner in No. 431. The Court will have before it for review that material in any case, and under the circumstances we respectfully suggest that it should avail itself of the opportunity to pass on the important questions presented not only in the contempt case but in the main case as well. The grant of the McConnell petition arose after the petition was filed in No. 431.

2. The trial court destroyed petitioner's rights under the antitrust laws by completely departing from the accepted and usual course of judicial proceedings. The following arbitrary procedures employed by the trial court are at least tacitly sanctioned by the decision of the Court of Appeals.

(a) The trial judge prior to the trial issued an order without argument or briefs, holding irrelevant and immaterial hundreds of documents concerned with

the conspiracy issue, particularly those dealing with the participation of Cross. Petitioner by this order was forbidden from presenting such documents at the trial (R. 353-374). This order was based upon lists of documents, largely by code number references, which the parties intended to offer at the trial and which lists were previously submitted under an agreed order (R. 74-5). The trial judge's exclusory order was made without the documents having been submitted to or seen or physically reviewed by the judge (R. 319, 325, 379), significant documents excluded were erroneously described (R. 321, 379, 383), others were excluded that had not been listed (R. 321, 383).

(b) Just prior to trial, the district judge announced a separation of the "public injury" and conspiracy issues for trial (R. 391-2, 432, 442) and later planned a further separation of the issue of damages (R. 1091-2). This separation was ordered as the trial court said:

> "* * * not to save any time primarily, but to squeeze unnecessary sympathy or prejudice from the trial of issues * * *" (R. 433).

(c) A jury trial was conducted, confined entirely to the irrelevant issue of "economic public injury" viz.: Was the public deprived of a "service of over-all superiority" by reason of the restrictive conspiracy and monopoly? (R. 1714).

(d) During the trial, petitioner's counsel sought to make offers of proof of the illegal conspiracy as proof that injury to the public in the legal sense, occurred. The trial judge first permitted and then prohibited these offers of proof; required questions to be put to witnesses as a basis for an offer of proof and then forbade such questions from being asked; repeatedly shifted his position on offers of proof (R. 546-7, 586, 588, 590, 592, 595-7, 600, 604, 611, 731-3).

(e) At the close of plaintiff's case, after denying motions to dismiss, the trial judge publicly announced that even if the jury returned a verdict

for plaintiff on the limited public injury issue, the case would be dismissed nevertheless because

> "it is not within the area of the family of antitrust" (R. 1107).

(f) Toward the end of the trial of the issue which the trial judge had sought to carve out of the complaint, *i. e.* public injury, the judge nevertheless stated:

> "I have not determined what public injury is" (R. 937).

(g) Arbitrary instructions were given to the jury even on the narrow and irrelevant public injury issue. The jury was instructed not to consider the increased price of transfer coupon imposed by Keeshin if it did not result "in an increase of [railroad] rates to the passengers" (R. 1713). Rejected was the instruction that the public includes the railroads and their stockholders (R. 1619). Rejected also was the request that the jury consider the higher rates paid by passengers directly for Keeshin's baggage pick-up and delivery services (R. 1618) and the higher transfer costs paid by passengers directly on short trips (R. 1618). Moreover, the court instructed the jury to consider "the comparative service provided" (R. 1711) but rejected an authorized letter from Keeshin's counsel to the Mayor of Chicago stating that Keeshin's proposed service was less extensive than petitioner's and that a "wide cleavage" between the two services existed (R. 884-91, Pl. Ex. 38, Ex. Vol. 90-1).

(h) Six weeks after the jury verdict, the trial judge cited petitioner's two attorneys, Freeman and McConnell, for criminal contempt and sentenced each of them to ten days in jail. The Freeman contempt was reversed by the Court of Appeals, 292 F. 2d 806, and the McConnell contempt reversed in part and the jail sentence reduced to a fine of $100.00. That action is now pending in this Court, No. 498.

(i) Despite the limitations imposed by the trial judge upon offers of conspiracy proof, the rejection of such offers and his striking them from the record as a matter of course (R. 603, 607, 626, 935, 934, 1016), the trial judge in his opinion and judgment dismissed the cause on a finding that such offers of proof failed to establish an antitrust violation (R. 1750, 1754-5).

The trial court's consistent pattern of restrictive and arbitrary rulings before, during and after the trial denied petitioner due process of law. These procedural issues present substantial questions of national importance which this Court should correct because trial by jury of treble damage suits is "an essential part of the Congressional plan for making competition rather than monopoly the rule of trade, * * *" (359 U. S. at p. 504).

3. The decision of the Court of Appeals if allowed to stand will seriously hamper the enforcement of the federal antitrust laws through governmental or private treble damage actions since it establishes the following precedents:

(a) Antitrust conspiracy trials may be segmented and specific issues ordered separately tried before a jury. Proof of conspiracy will accordingly be made far more difficult.

(b) An adverse ruling on the admissibility of a line of evidence will require complete offers of proof on all facets of those issues to protect against an afterthought holding that the offers of proof were not sufficient legally to establish the issues involved.

(c) A conspiracy of a dominant group of buyers in a market to select one seller as exclusive agent for an extended period and exclude all other competitors, is permissive.

(d) Railroads may combine and conspire in contracting for terminal services without regard to the federal antitrust laws.

(c) Conspiratorial restraints of competition and monopolizations of markets effected by the predatory and corrupt intervention of a government official are immune from the federal antitrust laws.

CONCLUSION.

For the reasons set forth above and in the petition for writ of certiorari, it is respectfully urged that rehearing be granted and that, upon such rehearing, a writ of certiorari issue to the Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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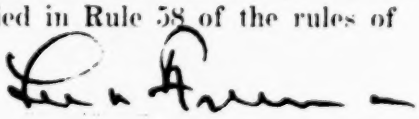
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January 4, 1961.

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58 of the rules of this Court.



LEE A. FREEMAN,
Attorney for Petitioner.

APPENDIX.

IN THE UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT.

No. 13175 SEPTEMBER TERM, 1960 APRIL SESSION, 1961

PARMELEE TRANSPORTATION COMPANY, a Delaware corporation, *Plaintiff*,

vs.

JOHN L. KEESHIN, ET AL., *Defendants*.

In the matter of criminal contempt of THOMAS C. McCONNELL, *Respondent-Appellant*.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

July 6, 1961.

Before DUFFY, SCHNACKENBERG and CASTLE, *Circuit Judges*.

SCHNACKENBERG, *Circuit Judge*. Thomas C. McConnell, respondent, has appealed from an order of the district court entered by Judge Julius H. Miner thereof, on June 30, 1960, adjudging him guilty of criminal contempt and sentencing him to confinement for a period of ten days on each of three specifications described in said contempt order, said sentences to run concurrently. The alleged acts of contempt occurred in connection with the trial of the case of *Parmelee* v. *Keeshin, et al.*[1]

1. An appeal in this case was decided in this court, as case No. 13160, on June 30, 1961.

1. Specification 5 reads as follows:

> "On April 21, 1960, prior to the selection of a jury, although Thomas C. McConnell, by his own statement, had read the transcript of the previous hearing in the cause at which the Court of its own motion suggested that consideration be given to separation of the issue of public injury for trial, and although no such suggestion or motion had been made by any attorney for any defendant at any hearing in the case, Mr. McConnell stated as follows:
>
> > "'This should be a forum where we could have that lawsuit tried without being hemmed in and penned in with a lot of artificial restrictions, dreamed up by counsel on the other side, whereby we are not given any opportunity to tell this jury what this lawsuit is about.'"

Respondent contends that he did not take the position that the court had no right to divide issues "under Rule 21," but that the issue the court proposed to segregate for trial was irrelevant. This position of respondent is supported by *Radiant Burners* v. *Peoples Gas Co.*, 364 U. S. 656, 660. In fact, Judge Miner, at the end of the case, seems to have conceded that McConnell was not arguing the power of the court to separate legitimate issues for trial, when the judge said:

> "* * * Plaintiff opposed the separation on legal grounds, arguing that it was unnecessary for plaintiff to prove public injury as such; * * *"

Nevertheless the court then said that he had read the briefs and the pleadings and that plaintiff made a specific allegation of public injury, which the defendants denied, and hence it was prerequisite that it be established.

We find it most difficult, if not impossible, to read into anything referred to in specification 5 any contumacious conduct by respondent. While no defense attorney had made a suggestion or motion for separation of the issue

of public injury for trial, the court had indicated that from reading the briefs and pleadings, the defendants had made a special denial of public injury and "that makes a prerequisite its establishment before we can go on with the others, the right to recover". In view of the correct contention of respondent that public injury was not a relevant issue, it is evident from the charge in specification 5 that respondent was referring to the arguments in the briefs and pleadings of defendants and that he had substantial basis for the language which he used, in view of the Supreme Court holding in *Radiant Burners, supra*, as well as *Radovich* v. *National Football League*, 352 U. S. 445, 453.

We hold that, on the record before this court, specification 5 does not validly charge respondent with contempt of court.

Specification 6 reads as follows:

> "On April 27, 1960, in the presence and hearing of the jury, after the Court had instructed the attorneys for plaintiff to refrain from repeatedly asking questions on subjects which the Court had ruled was not admissible, in the presence of the jury as distinguished from an offer of proof outside the presence of the jury, the following occurred:
>
> 'By Mr. McConnell: Now you are trying to tell us we can't ask these questions. We have a right to ask these questions, and until we are stopped from asking these questions we are going to ask them, because it is in our prerogative in doing it.
>
> 'By the Court: I am now stopping you from asking the questions about conversations with Mr. Cross, because I have ruled specifically, definitely and completely that it is not an issue in this case.
>
> 'By Mr. McConnell: We have a right to ask them.
>
> 'By the Court: You can offer proof on it.
>
> 'By Mr. McConnell: We have a right to ask

questions which we offer on this issue, and Your Honor can sustain their objection to them. We don't have a right to read the answers, but we have a right to ask the questions, and we propose to do so unless some bailiff stops us.'"

As indicated in our opinion in No. 13160, the case of *Parmelee* v. *Keeshin, et al.*, was on trial before court and jury when respondent proposed to make offers of proof outside the presence of the jury. Upon defendants' rejection of plaintiff's suggestion, the court ordered the trial to proceed. Respondent stated that the offers would involve proof of the conspiracy and monopoly issues, which he was advised "will have to be made outside the presence of the jury". The court responded: "That is correct. That is my ruling."

Respondent explained that he was simply laying a basis in the record for an appeal and that he wished to have the record show the offers that he was making.

He attempted to follow the usual procedure, which consists of putting a question to a witness in the presence of the jury and, when an objection is made, an offer of proof is made out of the presence of the jury.[2] Finally the court admitted that this procedure followed by respondent was required by "the cases" as he "read them". However, later the court struck from the record several offers of proof bearing upon the charges of conspiracy and monopoly, for the reason that these charges had nothing to do with the question of public injury.

It is obvious that respondent, although with difficulty, was maintaining his client's position, despite the shift in the court's rulings as to the submission of offers of proof in a jury case. The method that respondent followed is in accord with the long-established practice in Anglo-Saxon courts and this incident emphasizes the great im-

2. This procedure is recognized by 28 U.S.C.A. Rule 43(c).

portance of trial court experience for lawyers generally. Ironically, respondent's adherence to what he had learned in this respect in the courts led to his being ordered to jail. Fundamentally there is no adequate substitute in the heat of a contested trial for prior trial experience. Of course in these days, when more money can be made by lawyers outside of courtrooms, the number of experienced trial lawyers is rapidly decreasing. So, to supply a synthetic experience in capsule form to take the place of trial experience, we have rules of court, such as 28 U. S. C. A. Rule 43 (c), *supra*, just as we have vitamin pills as a substitute for meals which always have taken considerable time in preparation as well as in eating. So, now, without trial experience, or the expenditure of time to learn why it is so, the modern lawyer may simply read the rules of civil procedure and practice according to the rule book. If there is any area of trial court practice which is not now covered by the rules, it is probable that a new rule will be promulgated in due time.

We have attempted to reproduce the essence of the turbulence under which respondent was required to act in protecting his client's rights. It is not the purpose of this opinion to decide whether he was correct in his statement of the substantial rights of his client. We are here concerned with the question of whether respondent as an attorney conducted himself properly in an attempt to represent his client. It was his right as well as his duty to firmly and respectfully advance plaintiff's claims and assert its rights. In so doing, he had as much right to be in the courtroom and to act as did the judge. He had a right, when the court ruled that he could not introduce evidence, to make offers of proof thereof, to the end that, in case of an appeal, a proper basis for a review might appear in the record. The presiding judge had a right to punish respondent for any contumacious violation of

his duty as a member of the bar in this proceeding. Power to punish for contempt is one which must be used sparingly and only when it is clearly demonstrated that the respondent's conduct is contumacious and tends to bring the administration of justice into disrepute, rather than when his conduct is that of a determined level-headed practitioner who is acting respectfully to the court under considerable pressure in a lengthy and important trial.

18 U. S. C. A. § 401 provides:

> A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as—
>
> (1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;
>
> • • • • •

In *Ex parte Hudgings*, 249 U. S. 378, 383, the court said:

> "An obstruction to the performance of judicial duty resulting from an act done in the presence of the court is, then, the characteristic upon which the power to punish for contempt must rest. This being true, it follows that the presence of that element must clearly be shown in every case where the power to punish for contempt is exerted— • • •"

This case was cited with approval in *In re Michael*, 326 U. S. 224, 228.

In the case at bar the order from which the appeal was taken contains no finding that respondent's conduct tended to obstruct or continued to obstruct the administration of justice, although we do not base our decision on this omission. Rather we think that its absence strongly indicated that the district court could find no support in the record for such a statement. Actually it appears that the specifications upon which the order was based were not made until several weeks after the trial in question had occurred.

As to specification 6, we hold that, with the exception of one statement attributed to respondent, nothing with which he is charged has been supported by proof of contumaciousness or disrespect.

The exception in specification 6, to which we have just referred, charges that respondent said:

> "'We don't have a right to read the answers but we have a right to ask the questions, and we propose to do so unless some bailiff stops us."

The whole theory for holding respondent immune from his conduct in representing his client in good faith is satisfied when he is permitted to make a record in a respectful manner in the trial court for use in a court of review. The theory rests on the premise that he needs no further protection than an adequate record and that, if the court infringes his right to make such a record, his redress is in the court of review. His language which we now quote indicates that he did not rely alone upon this protection but that he took the position that he intended to physically defy the court to the point that only a superior physical force called upon by the court could prevent him from proceeding. Even if he was right in his method of making a record and the court was wrong, this threat was inexcusable contumacious conduct. While events did not precipitate a physical clash, respondent made it clear when he uttered these words that he proposed to insist upon pursuing his course of action until stopped by a court bailiff. This proof is enough to support specification 6 and to that extent will require an affirmance of the order from which this appeal has been taken. We shall, however, reduce the punishment thereunder to a fine of $100.

Specification 7 reads:

> "Repeatedly during the course of the trial Thomas C. McConnell conducted himself in a contumacious

> manner by employing a tone of voice and an attitude indicating contempt and defiance of the Court and disregarding admonitions of the Court with respect to his conduct before the jury."

This specification, without citation of any part of the record to support it, is too general to require an answer by respondent or a definitive ruling by this court. If the law were otherwise, we would be required to determine whether the order was justified without being directed to a single fact, word or deed alleged to have been spoken or performed by the accused. As one court said in regard to such a charge:

> "* * * The conclusions of the judge, unsupported by specific facts, in a direct contempt proceeding bear no weight whatsoever."

People v. *Hassakis*, 6 Ill. 2d 463, 129 N. E. 2d 9, 11. To the same effect are cases summarized in 154 A. L. R. 1227.

We find nothing cited in a brief filed by the United States attorney in support of the contempt orders which justifies specification 7. In fact, that brief seeks shelter in the argument that, inasmuch as concurrent sentences were imposed on each of several specifications, the upholding of an order on any one is sufficient.

We hold that specification 7 does not constitute contempt as a matter of law since it recites mere conclusions and no facts on which the alleged contempt is based.

2. Respondent contends that fundamental fairness required that Judge Miner disqualify himself from acting in the contempt matter. This, he says, is because Judge Miner considered the alleged contempts as a personal attack upon himself, and, at the same time, he conceded that there was "no emergency about it".

Respondent relies particularly upon *Offutt* v. *United*

States, 348 U. S. 11; *In re Murchison*, 349 U. S. 133; and *Farese v. United States*, 1 Cir., 209 F. 2d 312, 315.

It is a general rule that a direct contempt against the court is not sufficient to disqualify a court or a judge thereof. *Patterson v. Colorado*, 205 U. S. 454, 463.

In discussing rule 42 (a)[3] the court said in *Sacher v. United States*, 343 U. S. 1, 11:

> "A construction of the Rule is advocated which would deny a judge power summarily to punish a contempt that is personal to himself except, perhaps, at a moment when it is necessary to forestall abortion of the trial. His only recourse, it is said, is to become an accuser or complaining witness in a proceeding before another judge.
>
> "The Rule itself expresses no such limitation, and the contrary inference is almost inescapable. It is almost inevitable that any contempt of a court committed in the presence of the judge during a trial will be an offense against his dignity and authority. At a trial the court is so much the judge and the judge so much the court that the two terms are used interchangeably in countless opinions in this Court and generally in the literature of the law, and contempt of the one is contempt of the other. It cannot be that summary punishment is only for such minor contempts as leave the judge indifferent and may be evaded by adding hectoring, abusive and defiant conduct toward the judge as an individual. Such an interpretation would nullify, in practice, the power it purports to grant."

In *Offutt v. United States*, *supra*, the court considered a proceeding growing out of a criminal trial where Offutt was defendant's trial counsel. From the opinion of the Supreme Court the following statement of facts appears, at 12:

* * * * *

3. 18 U. S. C. A. rule 42(a).

"* * * Almost from the outset, a clash between the presiding judge and petitioner became manifest, which, it is fair to say, colored the course of the trial throughout its 14 days, and with increasing personal overtones. The judge again and again admonished petitioner for what he deemed disregard of rulings and other behavior outside the allowable limits of aggressive advocacy, and warned him of the consequences by way of punishment for contempt which such conduct invited. On the other hand, these interchanges between court and counsel were marked by expressions and revealed an attitude which hardly reflected the restraints of conventional judicial demeanor. Such characterization of necessity derives from an abiding impression left from a reading of the entire record.

"At the close of the trial, after the jury had retired for deliberation, the judge, acting under the procedure prescribed by Rule 42 (a) of the Federal Rules of Criminal Procedure and invoking the authority of *Sacher* v. *United States*, 343 U. S. 1, found the petitioner guilty of criminal contempt on the basis of a certificate filed under the Rule, containing 12 findings of 'contumacious, and unethical conduct in open court during the trial,' and ordered him committed for 10 days to the custody of the United States Marshal for the District of Columbia.

"The Court of Appeals found that four of the 12 findings amply supported the commitment, but reduced the punishment from 10 days to 48 hours. It concluded that 'the record does not support the penalty imposed. Appellant's conduct cannot fairly be considered apart from that of the trial judge. Each responded to great provocation from the other. * * *.'"

The court pointed out at 17:

"* * * The record discloses not a rare flare-up, not a show of evanescent irritation—a modicum of quick temper that must be allowed even judges. The record is persuasive that instead of representing the impersonal authority of law, the trial judge permitting himself to become personally embroiled with the petitioner. * * *"

In reversing, the court suggested that the judge who imposed the sentence should invite the assignment of another judge to sit in the second hearing on the charge against the petitioner.

In the present appeal, while what we have said herein has not been in entire approval of the conduct of the district court, we do not find that he was personally involved in controversy with the respondent or that in his rulings leading to the orders appealed from he was actuated by personal enmity toward either of the lawyers held in contempt. Accordingly we do not feel that the *Offutt* case requires that upon the record before us there should be a remandment for retrial before another judge. Whatever may have been the reasons that caused the trial judge to commit the errors which we have recounted in cases Nos. 13160, 13175 and 13176, the records before us affirmatively rebut any personal enmity harbored by the judge against the two respondents before him.

We, therefore, hold that the district court did not err in failing to refer the questions of contempt to the executive committee for assignment for hearing by another judge.

3. In addition to the specifications aforesaid, the order now under attack contains some prefatory remarks which respondent characterizes as "a diatribe without any support in the record." He refers to this language:

> "* * * Both attorneys for the plaintiff herein, embarked upon a course of unprofessional, unethical, intimidating, insulting, defiant, unfair and improper behavior, to foist their will upon the Court and jury and to dominate the course of procedure herein without regard to an honest and impartial administration of justice."

Inasmuch as the court's order must stand or fall on the specifications, the language in the preface is unim-

portant, unless it supports respondent's contention that it showed the prejudice of the trial judge and that he was "incapable of giving him any kind of a fair hearing on the issue of contempt". We cannot give it such effect. Nor does the court's language in the preface indicate that the order of contempt or the punishment therefor was based upon the conduct described other than in the specifications. In this respect, we are impressed by the reasoning of the court in *MacInnis* v. *United States*, 9 Cir., 191 F. 2d 157, 161 cert. denied 342 U. S. 953:

> "* * * The court's remarks addressed to counsel after the verdict had been returned admirably show the poise of the judge and that the sentence was based upon the statements contained in the certificate in their frame of circumstance. The court's reference to the general conduct of counsel throughout the trial does not indicate that either the judgment of contempt or the punishment therefor rests upon such conduct. The court found appellant's statements to be contemptuous and measured the punishment to fit the offense. The court's remarks constitute an explanation of the fact that counsel's conduct other than the contemptuous remarks was such that the contemptuous statements would not be condoned."

In accordance with the reasons which we have stated, the order from which this appeal has been taken is reversed as to respondent Thomas C. McConnell, except as to specification 6 therein only as to which it is affirmed and this cause is remanded to the district court with instructions to vacate the sentence imposed and in lieu thereof to impose a fine of $100 on said specification 6, to be paid by respondent Thomas C. McConnell to the clerk of the district court, pursuant to law.

ORDER REVERSED IN PART AND
IN PART AFFIRMED AND
REMANDED WITH INSTRUCTIONS.

DUFFY, *Circuit Judge*, dissenting in part.

I agree with the majority opinion that the convictions under Specifications 5 and 7 should be reversed. I also agree that Judge Miner did not err in failing to ask the Executive Committee to assign another judge to hear the charges of contempt.

I would also reverse as to Specification 6. The majority opinion describes the difficulties the plaintiff's counsel McConnell encountered in trying to preserve his client's rights. The attorneys for plaintiff were driven to a sense of frustration due to the District Court's ruling on offers of proof. Under such circumstances, it is understandable that an attorney might say things which should not have been said. I think that was the situation in the case at bar.

However, the majority opinion does not adequately present the setting in which the McConnell statement was made. He addressed the Court as follows: "We have a right to ask questions which we offer on this issue, and Your Honor can sustain their objection to them. We don't have a right to read the answers, but we have a right to ask the questions, and we propose to do so unless some bailiff stops us." McConnell's statement occurred during the reading of the deposition of Howard E. Simpson, president of the Baltimore & Ohio Railroad. Simpson was a defendant. One of plaintiff's attorneys was reading portions of Simpson's adverse examination to lay the foundation for an offer of proof. The statement made by McConnell was followed almost immediately by a recess. When the court session was resumed, Mr. McConnell complied with the Court's ruling, and did not persist in asking the particular questions.

It might be noted that counsel's vigorous insistence on preserving his client's right bore fruit, as the trial judge later changed his ruling. Counsel was then permitted to

ask questions in the presence of the jury as a condition precedent to the offers of proof made in accordance with Rule 43(c), Federal Rules of Civil Procedure.

Mr. McConnell has had much trial experience. Even under the stress of the exasperating conditions such as he encountered, he should never have threatened to continue asking the questions in view of the Court's rulings, although he felt certain the rulings were incorrect. After the recess, when he had had time to cool down and consider the language used, he should have apologized to the Court.

Nevertheless, Mr. McConnell did comply with the Court's order. At that point there was no interference with the conduct of the trial. There was no obstruction in the administration of justice. In my view, the conviction for criminal contempt under Specification 6 should also be reversed.